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PATTERN INSTRUCTIONS KANSAS 4TH CIVIL

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Prepared by:
KANSAS JUDICIAL COUNCIL
PIK-CIVIL ADVISORY COMMITTEE

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PIK - CIVIL

PREFACE

With this edition of pattern instructions our committee brings forth a new larger format and our first efforts at self-publication. We hope both endeavors are successful. It is our intent that the book will continue to be useful to the busy lawyer or judge who needs a quick reference to legal principles that come into play in most civil jury trials.

These instructions are patterns and they should be adapted to address the needs of a particular trial. We think counsel or a judge can put together from these patterns a set of instructions that both tells the jury what the law is and tells the jury what they are expected to do.

Our Committee works on this book every other year and we seek your comments about these patterns. We will address as many concerns as we can during the limited time the Committee meets. Laws keep changing and courts continue to hand down judgments so revision of this volume never stops.

PIK–Civil 4th covers statutes enacted through the 2007 legislative session, Kansas Supreme Court decision through Vol. 285, No. 2, and Kansas Court of Appeals decisions through Vol. 38, No. 4.

The members of the Advisory Committee are: Hon. Stephen D. Hill, Chair, Paola; Hon. David W. Boal, Kansas City; Hon. Thomas H. Bornholdt, Olathe; Professor James Concannon, Topeka; Hon. David W. Kennedy, Wichita; Hon. Thomas E. Malone, Wichita; Hon. Donald R. Noland, Girard; Hon. Nancy E. Parrish, Topeka; Hon. Janice D. Russell, Olathe; Hon. Philip C. Vieux, Garden City; and Hon. Mike E. Ward, El Dorado.

We recognize the hard work and diligence of the entire Judicial Council team that labor over this volume, but especially Nancy Strouse.

Hon. Stephen D. Hill, Chair
Kansas Judicial Council
PIK-Civil Advisory Committee

PREFACE 2010 SUPPLEMENT

The Committee calls to your attention that the 2010 Supplement to PIK-Civil 4th contains significant changes to most of the instructions in Chapters 101 through 105. Those instructions have been redrafted for clarity and ease of comprehension by the jurors who hear and read them. This has not been an easy task, but all of the comments the Committee received after posting the proposed amendments on the Judicial Council's website were favorable. As always, the Committee solicits constructive suggestions from those "in the field" using these instructions. Your feedback is important to the Committee as jury instructions are never finished and must be revised regularly in order to accurately reflect any changes in the law.

PIK–Civil 4th 2010 Supplement covers statutes enacted through the 2009 legislative session, Kansas Supreme Court decision through Vol. 289, No. 2, and Kansas Court of Appeals decisions through Vol. 42, No. 2.

The members of the Advisory Committee are: Hon. Stephen D. Hill, Chair, Paola; Hon. David W. Boal, Kansas City; Hon. Thomas H. Bornholdt, Olathe; Professor James Concannon, Topeka; Hon. David W. Kennedy, Wichita; Hon. Michael J. Malone, Lawrence; Hon. Donald R. Noland, Girard; Hon. Nancy E. Parrish, Topeka; Hon. Janice D. Russell, Olathe; Hon. Philip C. Vieux, Garden City; and Hon. Mike E. Ward, El Dorado.

Hon. Stephen D. Hill, Chair
Kansas Judicial Council
PIK-Civil Advisory Committee

PREFACE

2012 SUPPLEMENT

PIK–Civil 4th 2012 Supplement covers statutes enacted through the 2011 legislative session, Kansas Supreme Court decisions through Vol. 293, No. 1, and Kansas Court of Appeals decisions through Vol. 46, No. 3.

The members of the Advisory Committee were: Hon. Stephen D. Hill, Chair, Paola; Hon. David W. Boal, Kansas City; Hon. Edward E. Bouker, Hays; Professor James Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. David W. Kennedy, Wichita; Hon. Timothy Lahey, Wichita; Hon. Michael J. Malone, Lawrence; Hon. Nancy E. Parrish, Topeka; Hon. David Stutzman, Manhattan; Hon. Philip C. Vieux, Garden City; and Hon. Mike E. Ward, El Dorado.

Hon. Stephen D. Hill, Chair
Kansas Judicial Council
PIK-Civil Advisory Committee

**PREFACE
2014 SUPPLEMENT**

PIK–Civil 4th 2014 Supplement covers statutes enacted through the 2013 legislative session, Kansas Supreme Court decisions through Vol. 298, No. 1, and Kansas Court of Appeals decisions through Vol. 49, No. 3.

The members of the Advisory Committee were: Hon. Mike E. Ward, Chair, El Dorado; Hon. Edward E. Bouker, Hays; Professor James Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. David W. Kennedy, Wichita; Hon. David J. King, Leavenworth; Hon. Timothy Lahey, Wichita; Hon. Nancy E. Parrish, Topeka; Hon. David Stutzman, Manhattan; Hon. Philip C. Vieux, Garden City; and Hon. Sara Welch, Olathe.

Hon. Mike E. Ward, Chair
Kansas Judicial Council
PIK-Civil Advisory Committee

**PREFACE
2016 SUPPLEMENT**

PIK–Civil 4th 2016 Supplement covers statutes enacted through the 2015 legislative session, Kansas Supreme Court decisions through Vol. 302, No. 3, and Kansas Court of Appeals decisions through Vol. 51, No. 7.

The members of the Advisory Committee were: Hon. Mike E. Ward, Chair, El Dorado; Hon. Edward E. Bouker, Hays; Professor James Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. David W. Kennedy, Wichita; Hon. Timothy Lahey, Wichita; Hon. Nancy E. Parrish, Topeka; Hon. David Stutzman, Manhattan; Hon. Philip C. Vieux, Garden City; and Hon. Sara Welch, Olathe.

Hon. Mike E. Ward, Chair
Kansas Judicial Council
PIK-Civil Advisory Committee

**PREFACE
2018 SUPPLEMENT**

PIK–Civil 4th 2018 Supplement covers statutes enacted through the 2017 legislative session, Kansas Supreme Court decisions through Vol. 307, No. 1, and Kansas Court of Appeals decisions through Vol. 55, No. 1.

The members of the Advisory Committee were: Hon. Mike E. Ward, Chair, El Dorado; Hon. Edward E. Bouker, Hays; Professor James Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. David W. Kennedy, Wichita; Hon. Timothy Lahey, Wichita; Hon. Nancy E. Parrish, Topeka; Hon. Philip C. Vieux, Garden City; and Hon. Robert J. Wonnell, Olathe.

Hon. Mike E. Ward, Chair
Kansas Judicial Council
PIK-Civil Advisory Committee

**PREFACE
2020 SUPPLEMENT**

PIK–Civil 4th 2020 Supplement covers statutes enacted through the 2019 legislative session, Kansas Supreme Court decisions through Vol. 310, No. 3, and Kansas Court of Appeals decisions through Vol. 57, No. 3.

The members of the Advisory Committee were: Hon. Mike E. Ward, Chair, El Dorado; Hon. Kevin Berens, Colby; Professor James Concannon, Topeka; Hon. Dan Creitz, Iola; Hon. Amy J. Hanley, Lawrence; Hon. David W. Kennedy, Wichita; Hon. Timothy Lahey, Wichita; Hon. Nancy E. Parrish, Topeka; and Hon. Robert J. Wonnell, Olathe.

Hon. Mike E. Ward, Chair
Kansas Judicial Council
PIK-Civil Advisory Committee

The PIK Advisory Committee welcomes your input. Comments and suggestions about the pattern instructions in this book may be emailed to: judicial.council@ks.gov.

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A. ORIENTATION FOR VENIRE**101.01****JURY HANDBOOK USAGE RECOMMENDED**

The Committee has reorganized and updated the handbook for jurors that follows as PIK 4th 101.02. The handbook is intended to provide basic information about the jury trial process in an effort to anticipate and answer many of the questions that prospective jurors often have. It can be mailed to prospective jurors with their summons, handed to them as they arrive at the courthouse, or the judge may choose to read all or parts of it to prospective jurors before or during jury selection. However judges choose to approach jury orientation and jury selection, the Committee simply recommends that the handbook be utilized in some fashion.

When orienting or selecting a jury, the trial judge must take care to be accurate when describing the law or trial procedure and to avoid any comment(s) that might be perceived as indicating bias or a suggestion as to how the judge would resolve any of the factual issues in the case.

Comment

A number of cases through the years have involved a claim of error predicated upon comments made by the trial judge during jury orientation or selection. See *State v. Reuter*, 126 Kan. 565, 268 Pac. 845 (1928); *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001); *State v. Plunkett*, 257 Kan. 135, 891 P.2d 370 (1995).

The trial court's jury orientation comments will be reviewed on appeal under the judicial misconduct standard of review. It must affirmatively appear that the conduct was of such a nature as to prejudice the substantial rights of the complaining party. *State v. Nguyen*, 251 Kan. 69, 833 P.2d 937, Syl. ¶¶ 4, 5 (1992).

101.02

HANDBOOK FOR JURORS**I. The Importance of Jury Service**

Jury service is a serious obligation of all qualified citizens, and is a vital part of our American system of justice. By carrying out their task well and faithfully, jurors help resolve controversies, enforce our laws, and preserve the legal rights of our citizens.

II. Excuses From Jury Duty

Excuses from jury duty should be sought only for reasons of compelling personal hardship or because requiring jury service would be contrary to the public health, safety or welfare. Although jury service can be inconvenient or financially burdensome, experience has shown that most jurors feel that any such inconvenience or personal expense is far outweighed by the value and importance of jury service to the community at large. If you believe that you cannot or should not be required to serve as a juror in this case, you will have the opportunity to state your reasons to the judge.

III. Composition of Jury Panel

Parties have the right to juries selected from a fair cross section of the county in which the court convenes. As such, prospective jurors are selected at random from county voter registration records or lists of licensed drivers or persons holding state-issued identification cards who reside in the county, and/or census records.

IV. Civil and Criminal Cases

In civil cases, parties generally claim that their person or property has been injured or damaged by the wrongful act of another. Money is normally sought as compensation for the claimed injury. Parties in civil cases may also seek a court order establishing or enforcing contractual or other legal rights or obligations. Examples of civil cases would be motor vehicle accident cases or real estate contract disputes. The person bringing the suit is the plaintiff, and the party being sued is the defendant.

Criminal cases are those in which the plaintiff is generally the State of Kansas and is represented by the prosecuting attorney who starts the case by filing a complaint alleging that the defendant has violated the law in

some respect. The defendant is presumed to be innocent of all charges. The prosecutor must establish the defendant's guilt by proof beyond a reasonable doubt. The defendant is not required to present evidence.

V. Role of the Attorneys, Judge, and Jury

Attorneys have the obligation to represent their clients in a competent and professional manner. They present evidence to support the claims of their clients. They may challenge or question the evidence presented by other parties to the lawsuit. At times they will object to certain evidence offered by the other parties if they believe that such evidence should not be admitted.

The judge has the duty to decide what evidence may be received and considered by the jury; to control the progress of the trial; to rule on all questions of law; and to instruct the jury on the law that applies to a given case.

The jury has the duty to listen closely to all of the evidence presented by any party; to determine from that evidence what the facts of the case are; to apply those facts to the law as instructed by the judge; and thus to arrive at a verdict in the case.

At times during the trial the judge and attorneys may discuss matters at the bench or otherwise outside your view or hearing. These conferences are necessary for various reasons, such as to resolve issues concerning the admissibility of certain evidence. Judges try to keep these conferences as few and brief as possible.

VI. Jury Selection Process

On the first day of trial, prospective jurors are given an oath to honestly answer questions concerning their qualifications to sit as jurors in the case. This questioning process is called *voir dire*, a French term meaning "to speak the truth." The questioning is done by the judge or by the attorneys, and sometimes both, and is intended to determine if prospective jurors have any personal interest in or knowledge of the case; whether they are related to or personally acquainted with the parties or their attorneys; or whether they, for whatever reason, have a personal feeling or bias that would make it difficult for them to be fair and impartial to both sides of the case.

During the questioning of prospective jurors, a person may be challenged for cause if it is shown that he or she would not be an appropriate juror for the particular case. The judge will excuse the person from the panel if the cause given is deemed sufficient. Once the questioning of prospective jurors is complete, the parties will then exercise a certain number of challenges for which no cause is necessary. These are known as peremptory challenges. The

peremptory challenge is a legal right long recognized as a means of giving both sides some choice in the make-up of the jury. Jurors should understand that being removed from the jury panel for cause or by a peremptory challenge is no reflection upon their ability or integrity.

The judge may also decide to select one or more alternate jurors to serve in the place of regular jurors who become unable to fulfill their duties at some point during the trial. Alternate jurors may be selected at the same time the regular jurors are selected, or after the regular jury has been selected. Alternate jurors are selected in the same manner, and have the same qualifications and duties as regular jurors.

VII. Stages of the Trial

- A. **Opening Statement.** Once the jury has been selected, the attorneys are entitled to make opening statements outlining what they believe the evidence in the case will be. These statements are intended to help the jury in following and understanding the evidence as it is presented.
- B. **Presentation of Evidence.** Following opening statements, the parties then present the testimony of witnesses and other forms of evidence in an effort to prove their claims in the lawsuit, or in an effort to disprove the claims of the other party. Defendants are not required to present evidence.
- C. **Instructions By the Judge.** Once the parties have presented all of their evidence, the judge will then prepare and read to the jury a set of instructions outlining the law that applies to the particular case. The jurors will take these instructions with them to the jury room to serve as their guide in the deliberation process.
- D. **Final Arguments.** Following the reading of the jury instructions by the judge, the attorneys are then entitled to make final arguments in which they state what they believe the evidence has been and how the evidence should be viewed and applied in light of the judge's instructions.
- E. **Deliberation and Verdict.** The jury will first select one of its members as presiding juror to sign the verdict form and to speak for the jury in open court. In a criminal case, the jury's verdict as to any crime charged must be unanimous, that is, all jurors must agree upon the verdict. In a civil case, the agreement of 10 out of 12 jurors is sufficient.

VIII. Courtroom Etiquette

The courtroom is a place where all persons should conduct themselves with dignity, courtesy and proper respect for the court and everyone present. Noisy or disruptive conduct is not allowed. The clothing worn by jurors may be casual but should be appropriate for the serious business of the court. Hats and caps should be removed upon entering the courtroom. If cellular phones are allowed in the courthouse, they must be turned off at all times in the courtroom. Newspapers, magazines, books, etc. should be put away. Quiet and close attention to the proceedings at hand is the order of the day.

IX. Conduct of the Jury During Trial

Each juror must pay close attention to the testimony and keep an open mind throughout the trial. Jurors can and should use the knowledge they possess in common with persons in general. Jurors are encouraged to use their common sense.

Until all of the evidence has been presented and the final instructions given by the judge, jurors must not discuss the case among themselves or with anyone else, including anyone outside the courthouse. If anyone attempts to talk with a juror about the case, the juror should tell this person that such conversation is not proper and should cease. The juror should also report the matter to the bailiff at the earliest opportunity.

Jurors must receive all of their information about the case from the trial itself, and must not rely on any other source of information. Jurors must not search for, read or listen to any information from the internet relating in any way to the case. Jurors must avoid listening to, reading or viewing any media coverage of the case. If during the trial a juror learns some information about the case outside the trial, the juror should inform the judge. He or she must not mention any such information to other jurors. Jurors must never inspect the scene where the events occurred. If such an inspection is necessary, the judge will have the jurors go as a group to the scene.

Once the case has been submitted to the jury for deliberation of a verdict, jurors should freely exchange their views and should give proper consideration to the views of other jurors. No juror is required to abandon any opinion which the juror believes is correct, but jurors should be willing to change their opinion if they become convinced by other jurors that such opinion is not correct.

X. Accommodating the Needs and Concerns of Jurors

Understanding that jury service can at times be a burden, the judge and staff will make every effort to minimize any inconveniences. Depending on the particular county in which the case is handled, information regarding parking, dining establishments, cellular phone use, disability accommodations, etc. may be separately provided. Although some cases are shorter in duration and some can be much longer, the average jury trial takes 2-3 days. Except in very rare instances, you will be allowed to return home each evening.

During the trial, if you cannot hear the proceeding, or need to take a restroom break, just raise your hand and let the judge know. If you have other concerns regarding your comfort or convenience or that of other jurors, do not hesitate to express that concern to the bailiff during a break in the proceedings.

101.03**IMPORTANCE OF JURY SERVICE****Comment**

This instruction has been deleted and is now incorporated in PIK 4th 101.02, Section I. When a judge prefers, PIK 4th 101.02 can be presented orally in whole or in part.

101.04

METHOD OF SELECTING JURY PANEL

Comment

This instruction has been deleted and is now incorporated in PIK 4th 101.02, Section III. When a judge prefers, PIK 4th 101.02 can be presented orally in whole or in part.

101.05**EXCUSES FROM JURY DUTY****Comment**

This instruction has been deleted and is now incorporated in PIK 4th 101.02, Section II. When a judge prefers, PIK 4th 101.02 can be presented orally in whole or in part.

101.06

TYPES OF CASES

Comment

This instruction has been deleted and is now incorporated in PIK 4th 101.02, Section IV. When a judge prefers, PIK 4th 101.02 can be presented orally in whole or in part.

101.07**TRIAL PROCEDURES****Comment**

This instruction has been deleted and is now incorporated in PIK 4th 101.02, Sections VI and VII. When a judge prefers, PIK 4th 101.02 can be presented orally in whole or in part.

101.08

FUNCTIONS OF JUDGE, COUNSEL, AND JURY

Comment

This instruction has been deleted and is now incorporated in PIK 4th 101.02, Sections V, VII, and IX. When a judge prefers, PIK 4th 101.02 can be presented orally in whole or in part.

101.09**JURY DELIBERATIONS****Comment**

This instruction has been deleted and is now incorporated in PIK 4th 181.01.

B. PRELIMINARY INSTRUCTIONS TO PANEL

101.10

CONDUCT OF JURORS

Comment

This instruction has been deleted and is now incorporated in PIK 4th 101.02, Section IX. When a judge prefers, PIK 4th 101.02 can be presented orally in whole or in part.

101.11

NOTE TAKING BY JURORS

Members of the jury, you will be permitted to take notes during the trial. Whether you do so is entirely up to you. However, do not allow the taking of notes to distract you from listening attentively to the testimony of a witness.

You may use your notes to refresh your memory as you deliberate. However, your deliberations must be based upon the collective memory and recollection of the entire jury as to the evidence admitted. Notes should be used only as an aid to this function and not as a substitute.

You must not remove any of your notes from the courthouse. At the beginning of a recess give your packet of notes to the bailiff. Your notes will be returned to you when court reconvenes.

At the conclusion of the trial, all notes must be given to the bailiff for immediate destruction.

Comment

The court may wish to consider the anticipated length of the trial, the technical nature of the subjects about which the witnesses will testify, and the amount of detail that must be sifted through by the jurors in order to be competent fact finders.

Note taking by jurors is a matter of “sound judicial discretion.” *State v. Jackson*, 201 Kan. 795, 799, 443 P.2d 279 (1968), *cert. denied* 394 U.S. 908, 89 S. Ct. 1019, 22 L. Ed. 2d 219 (1969) *overruled on other grounds* in *State v. Mims*, 220 Kan. 726, 556 P.2d 387 (1976). A more comprehensive review of the subject is contained in 14 A.L.R. 3d 831.

Permitting note taking without having first given the note taking instruction will be judged according to the “clearly erroneous” standard of review. *State v. Diggs*, 272 Kan. 349, 367-368, 34 P.3d 63 (2001).

101.12

INSTRUCTION FOR IMPANELED JURORS

Now that you have been chosen as jurors for this trial, you are required to decide this case only on the evidence admitted. At the end of the case, I will instruct you on the law that you must apply to the evidence in order to reach a verdict. For your verdict to be fair, you must not be exposed to any information about the case, the law, or any of the issues involved in this trial beyond that which is admitted during the trial.

Do not seek information about the case beyond what you see and hear in this courtroom. Do not use any printed or electronic sources to get information about this case or any of the issues involved. These sources include the internet, reference books, dictionaries, newspapers, magazines, television, radio, computers, smartphones, or any other electronic device. You must not do any personal investigation about the issues, including visiting any of the places involved in this case, or use Internet maps or Google Earth to examine the scene. You cannot talk to any possible witnesses, or create your own demonstrations or re-enactments of the events which are the subject of this case.

Do not communicate with anyone about this case or your jury service, and do not allow anyone to communicate with you. In particular, you may not talk about the case by using cell phones, emails, text messages, tweets, blogs, chat rooms, comments or other postings on Facebook or any other website. You may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached by anyone, in any way, about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. You should then report the contact to the bailiff of the court as soon as possible.

The court recognizes that these rules and restrictions may affect activities that you would consider to be normal and harmless. However, the law requires these restrictions to ensure the parties have a fair trial based on the evidence that each party has had an opportunity to produce and discuss.

Any juror who violates these rules and restrictions jeopardizes the fairness of these proceedings. Violations may be punished as contempt of court. In addition, a mistrial could result, causing the entire trial process to start over. If you become aware that a juror has done something that violates these instructions, you must report that to the court.

These rules and restrictions remain in effect until you have been discharged from your jury service.

Notes on Use

The Committee recommends that this instruction be read to the jury at the start of every trial. The proliferation of electronic devices giving unlimited access to outside-the-courtroom sources of information, human and digital, creates a very real possibility of juror misconduct and resulting mistrials.

101.20

QUALIFYING THE JURY**I. IDENTIFICATION OF THE CASE**

A. This is a civil action in which _____ is the plaintiff. The plaintiff sits _____, and is represented by _____ of _____, sitting _____. The defendant is _____ and is represented by _____ of _____, sitting _____. Briefly stated, this action arises out of an alleged _____.

B. This is a criminal case in which the plaintiff _____ (State, City) is represented by _____ of _____, sitting _____. The defendant _____, is sitting _____, and is represented by _____ of _____, sitting _____. The defendant is charged with _____.

Comment

At this point some judges may wish to identify court officers and state their duties.

II. PURPOSE OF VOIR DIRE

As prospective jurors you will be called and questioned so that the Court may determine your qualifications to serve in this case. The Court and the attorneys conduct this examination to obtain a fair and impartial jury and not to pry into your personal affairs. Because this is an important part of the trial, the law requires that prospective jurors be sworn before questions are asked. The Clerk will administer the oath.

III. OATH FOR VOIR DIRE

You, and each of you, do solemnly swear that you will true answers make to all questions propounded to you by court or counsel, touching upon your qualifications to serve as jurors in this case, so help you God?

Comment

Kansas Statutes recognizes the right of participation in this examination by the Court and by counsel. The Committee believes the following are not proper areas for examination:

1. Questions previously asked by Court or counsel, and answered.
2. Questions touching upon anticipated instructions.

3. Questions touching upon the verdict to be returned when those questions are based upon hypothetical facts and situations.
4. Questions that are in substance arguments of the case.

Additionally, the Committee believes that voir dire is best conducted when questions are not asked relative to data available from jury information sheets obtainable from the clerk and when collective questions are used as fully as practicable. Such restrictions as those found above may be made known to counsel by rule or informal statement.

101.30

RECESS INSTRUCTIONS

During this recess you must not talk about this case with any other person nor allow any other person to discuss the case with you. It is your duty to keep an open mind and you must not express any opinion about the case or form any fixed opinion until the case is finally submitted to you.

Notes on Use

When giving this instruction for the first time or at the end of each day, the judge may want to include all or portions of PIK 4th 101.12, Base Your Decision As A Juror On What Is Presented In Court, to augment the recess admonition.

Comment

The trial judge should admonish the jury pursuant to K.S.A. 60-248(d) whenever the jury is permitted to separate during the trial. But prejudicial error will not be presumed from such failure in the absence of a showing of substantial prejudicial misconduct on the part of the jurors resulting from a failure to give the statutory admonishment. The party claiming prejudice has the burden of proof. *Hawkinson v. Bennett*, 265 Kan. 564, 566, 962 P.2d 445 (1998).

101.40

VISITING SCENE OR AREA

You will be taken to the *(scene) (area)* involved in this case so that you may better understand the evidence that *(will come) (has come)* to you from the witness stand. You will be under the supervision of the *(bailiff) (sheriff)* at all times and will remain together until you are returned to the courtroom *(or are otherwise excused)*. Counsel may accompany you, but may not discuss this case or demonstrate anything relating to it. The *(bailiff) (sheriff)* may call to your attention certain features as previously requested by counsel. What you *(see) (have seen)* at the scene you may take into consideration in arriving at your verdict in so far as what you *(see) (have seen)* is supported by evidence coming to you in the courtroom.

Notes on Use

The last sentence of this instruction is not applicable in condemnation cases. See PIK 4th 131.15, View of Premises.

Comment

In its discretion a trial court may permit a jury to visit a scene involved in a case. *Williams v. Kansas City Public Ser. Co.*, 147 Kan. 537, 78 P.2d 41 (1938). See K.S.A. 60-248(b) for the provision of the Kansas Code of Civil Procedure on visiting scenes.

In *English Village Properties, Inc. v. Boettcher and Lieurance Constr. Co.*, 7 Kan. App. 2d 307, 314, 640 P.2d 1282 (1982), an instruction that failed to include the last sentence of the above instruction was termed “poorly stated,” but absent objection at trial was not held to be “clearly erroneous.”

101.50

WRITTEN STIPULATIONS OR AGREED EXHIBITS

Counsel have agreed upon written stipulations (*exhibits*) concerning _____. Because these stipulations (*exhibits*) may be difficult for you to remember, you will be able to have them with you during your deliberations. You should consider them as being true.

A. INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

102.01

CONSIDERATION AND APPLICATION OF INSTRUCTIONS

Members of the Jury: It is your duty to follow these instructions. These instructions are the law in this case and they all must be considered and applied to the evidence.

Notes on Use

This instruction is usually not needed. A number of the instructions that follow this instruction may be combined at the discretion of the judge, who may give only those that he or she feels are necessary in each case.

Comment

PIK 4th 102.01 is designed to guard against jurors selecting one instruction and using it in their deliberations without regard to the other instructions. See *Byas v. Dodge City Rendering Co.*, 177 Kan. 337, 279 P.2d 252 (1955).

102.02**EVALUATION OF EVIDENCE, INCLUDING DEPOSITIONS**

You must consider and weigh only evidence which was admitted during the trial, including exhibits, admissions, stipulations, and witness testimony either in person or by deposition.

[You must consider and weigh deposition testimony by an absent witness under oath using the same standards you apply to other testimony.]

Notes on Use

The use of depositions is permitted by K.S.A. 60-230–60-232. See also PIK 4th 102.30, Impeachment, when a deposition is used for impeachment purposes.

The bracketed portion should be given when deposition testimony was introduced during the trial.

The Committee believes this is an instance in which it is proper for the Court to call attention to specific evidence because testimony presented by an absent witness might otherwise be given less weight by the jury.

102.03

RULINGS AND ACTIONS OF THE COURT

During the trial I have ruled upon objections to the admission of evidence. You must not concern yourselves with the reasons for these rulings and you must consider only the evidence which is admitted. I have not intended to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

Notes on Use

The Committee recommends that this instruction be given.

102.04**STATEMENTS AND ARGUMENTS OF COUNSEL**

Statements and arguments of counsel are not evidence, but may help you understand the evidence and apply the law. However, you should disregard any comments of counsel that are not supported by the evidence.

102.05

SYMPATHY FOR OR AGAINST A PARTY

You must decide this case without favoritism for or prejudice against *(either) (any)* party. Sympathy should not influence your decision.

Notes on Use

This instruction ordinarily need not be given.

102.06**CONSIDERATION OF CORPORATE PARTIES**

Corporations are entitled to the same fair and impartial treatment as individuals.

Notes on Use

This instruction may be given when there are both corporate and individual parties to the action.

102.07

JUDGE'S OPINION

Comment

This instruction has been deleted and is now incorporated in PIK 4th 102.03, Rulings and Actions of the Court.

102.08**PRELIMINARY INSTRUCTIONS****A. PREFACE TO PRELIMINARY INSTRUCTIONS**

Members of the Jury, I will now give you some preliminary instructions on the law that I believe will be helpful to you in listening to the evidence in the case and understanding what issues you will be asked to decide at the end of the case. The instructions that I will give you now are not the complete instructions, and if the final instructions are different from these preliminary instructions, it is the final instructions that you must follow in reaching your verdict.

It sometimes happens that the attorneys and I believe at the beginning of the case that certain matters will be submitted to you for decision at the end of the case but the evidence is different from what the parties expected, or a party decides to abandon a claim or defense. That is why the final instructions are sometimes different from the preliminary instructions. Therefore, it is important that you understand that these instructions are only preliminary, and are meant to help you in listening to the evidence in the case.

B. IF JURY WAS GIVEN PRELIMINARY INSTRUCTIONS

As you remember, I gave you some general instructions before the attorneys presented any evidence. These preliminary instructions were meant to help you in listening to the evidence in the case and understanding what issues you would have to decide to reach your verdict.

The instructions that I am giving you now are the complete and final instructions. It is these instructions on the law that you must use during your deliberations. If the final instructions are different from the preliminary instructions, you should disregard the preliminary instructions and follow these instructions.

The instructions are in writing and you will have them in the jury room for your use during deliberations.

Notes on Use

K.S.A. 60-251 provides that the court must instruct the jury at the close of the evidence before argument. It also gives the trial court the discretion to give the jury instructions at any other time.

This provision creates a great opportunity for the trial judge to assist jurors in understanding their duty as well as some of the general rules they will use in deciding the case. The Committee recommends

that the trial court consider giving some of the basic instructions for considering evidence, the issues and burden of proof instruction, and any of the instructions on the substantive law regarding duties that are applicable to the case. In a comparative fault case, the instruction on comparative fault and the jury's duty to apportion fault should always be given as a preliminary instruction.

If the judge decides to give preliminary instructions, Part A of this instruction should be given as a preface to the preliminary instructions, then Part B should be included as part of the final instructions.

Although the Kansas Code of Civil Procedure does not require that the jury be given written instructions, the Committee believes that the jury should always be given written copies of the final instructions for use during deliberations. Giving the jury written copies of the final instructions does not substitute for the court's duty to give oral instructions—the court should always give the final instructions orally before final arguments.

102.09**FORM OF PRONOUN—SINGULAR AND PLURAL**

Whenever the word “he” is used in these instructions, you may consider it as applying equally to a woman or an entity, such as a corporation. Also, the use of the singular of a word may be taken equally to mean the plural.

Note on Use

It is better if a judge adopts the correct pronouns in the body of his or her instructions so that this instruction becomes unnecessary.

B. BURDEN OF PROOF DEFINED**102.10****MEANING OF BURDEN OF PROOF**

Burden of proof means burden of persuasion. A party that has the burden to prove a claim must persuade you that the claim is more probably true than not true. In deciding whether this burden has been met, you must consider all admitted evidence, whether presented by plaintiff or defendant.

Notes on Use

A court should not give this instruction in a land condemnation case. *City of Wichita v. Jennings*, 199 Kan. 621, 433 P.2d 351 (1967). For a discussion as to the issues in a condemnation suit requiring a burden of proof instruction, see Comment to PIK 4th 131.02, Burden of Proof.

Comment

For a case in which the trial court was held to have properly determined that the burden of proof as to one of the issues involved had been sustained as a matter of law and consequently was not to be submitted to the jury, see *Thompson v. Norman*, 198 Kan. 436, 445, 424 P.2d 593 (1967). The court discussed an objection that the trial court refused to instruct that the plaintiff could not recover if the evidence was evenly balanced. Apparently, the defendant had argued that refusal to give this instruction resulted in placing the burden of proof on him. The objection was held to be unfounded on the basis that the instructions, taken as a whole, adequately covered the burden of proof as to all issues.

102.11

BURDEN OF PROOF—CLEAR AND CONVINCING

Burden of proof means burden of persuasion. Insert name of party has the burden to prove insert claim. Insert name of party must persuade you of the truth of that claim by clear and convincing evidence. In determining whether insert name of party has met this burden you must consider all admitted evidence, whether presented by plaintiff or defendant.

Evidence is clear and convincing if it shows that the truth of the fact asserted is highly probable.

Notes on Use

This instruction is to be used when a party has the obligation to prove a fact by clear and convincing evidence. When the burden of proof of other facts in the case is by a preponderance of the evidence, this instruction should be given along with PIK 4th 102.10, Meaning of Burden of Proof. It should be modified to make clear the issues of fact to which each burden of proof applies.

Comment

See K.S.A. 60-401(d). A higher and more satisfactory character of proof is required to establish that an instrument or conveyance is not what it purports to be than is necessary in ordinary civil cases. See *Winston v. Burnell*, 44 Kan. 367, 24 P. 477 (1890).

The definition of clear and convincing evidence is based on the holding in *In re B.D.-Y.*, 286 Kan. 686, 187 P.3d 594 (2008), which disapproved all contrary definitions in prior opinions and in former PIK 4th 102.11.

For standard of proof required in action to cancel oil and gas lease, see *Jackman v. Lawrence Drilling & Development Co.*, 106 Kan. 59, 187 P. 258 (1920).

For the standard of proof required of one who asserts fraud, see *Hoch v. Hoch*, 187 Kan. 730, 359 P.2d 839 (1961). See PIK 4th 127.40, Fraud—Elements.

Clear and convincing evidence is necessary for third party beneficiaries to prove that testators had an oral contract between themselves to leave their property to the beneficiaries upon the death of the last testator. See *In re Estate of Stratmann*, 248 Kan. 197, 202, 806 P.2d 459 (1991).

Claimants are required to prove a claim for retaliatory discharge by clear and convincing evidence. *Ortega v. IBP, Inc.*, 255 Kan. 513, 874 P.2d 1188 (1994).

C. EVALUATION OF EVIDENCE

102.20

EVALUATION OF TESTIMONY

It is for you to decide whether the testimony of each witness is believable and what weight to give that testimony. In making these decisions, you have a right to use your common knowledge and experience.

Notes on Use

The Committee recommends that this instruction be given in every jury case.
See PIK–Criminal 4th 51.060.

Comment

The use of a previous version of this instruction was approved in *State v. Sanders*, 224 Kan. 138, 578 P.2d 702 (1978). In that case, the instruction was combined with PIK–Criminal 52.09, Credibility of Witnesses, and the substance of PIK 2.24 (First Edition, 1966) [now PIK 4th 102.20].

102.21**EVALUATION OF DEPOSITION EVIDENCE****Comment**

This instruction has been deleted and is now incorporated in PIK 4th 102.02, Evaluation of Evidence, Including Depositions.

102.22

WITNESS NEED NOT BE BELIEVED

Comment

It is recommended that no instruction of this type be given. Determination of credibility of witnesses is solely within the province of the jury and it is superfluous to inform them that certain witnesses need not be believed. The standards for assessing credibility of witnesses are adequately set forth in PIK 4th 102.20, Credibility of Witnesses.

102.23**WITNESS TESTIFYING FALSELY****Comment**

The Committee recommends that no instruction be given relating to testimony that may be false. Credibility of witnesses is solely within the province of the jury and our Supreme Court has approved of eliminating instructions “which focus on the credibility of certain testimony.” *State v. Willis*, 240 Kan. 580, 587, 731 P.2d 287 (1987). The matter is appropriately left to the closing arguments of counsel.

While some decisions have held the giving of an instruction relating to false testimony was not error, *e.g.*, *Cleveland v. Wong*, 237 Kan. 410, 424, 701 P.2d 1301 (1985), the Committee finds no recent cases where the giving of such an instruction was encouraged.

102.24

PARTY COMPETENT AS A WITNESS

Comment

The Committee recommends that no instruction on “party competent as a witness” be given.

102.30

IMPEACHMENT

In deciding the weight and credit you will give to the testimony of a witness, you may consider, along with all the other evidence, all evidence that affects the credibility of the witness, including:

[Evidence of prior conduct of the witness.]

[Evidence that on some former occasion the witness [(*made a statement*) (*acted in a manner*) (*testified*)] inconsistent with testimony the witness gave in this case.]

[Evidence that the reputation of the witness for (*honesty*) (*veracity*) (*honesty or veracity*) is bad.]

[Evidence of (*the interest the witness has in the result of the trial*) (*reasons the witness might favor one party over another*).]

[Evidence that the witness has been convicted of a crime involving dishonesty or false statement.]

[You may consider this evidence only as it affects the credibility of the witness and may not consider it for other purposes.]

Notes on Use

When PIK 4th 102.20, Credibility of Witnesses, is given, it is generally unnecessary to give this instruction. See PIK–Criminal 4th 51.220, in which the Committee recommends that no separate instruction regarding impeachment be given in criminal cases because the instruction on Credibility of Witnesses provides the jury adequate guidance. Moreover, in instances where evidence is admissible for one purpose, e.g. impeachment, but is inadmissible for some other purpose, the appropriate time to give an instruction limiting the jury’s use of the evidence is when the evidence is received. See K.S.A. 60-404, which codifies the contemporaneous objection rule, and K.S.A. 60-406, which requires the judge “upon request” to “restrict the evidence to its proper scope and instruct the jury accordingly.”

The final paragraph of the instruction should not be given regarding evidence that is admissible both for impeachment and for other purposes. For example, prior inconsistent statements of testifying witnesses ordinarily may also be used under the hearsay exception in K.S.A. 60-460(a) to prove the truth of the facts asserted in the statement. Prior inconsistent statements of parties, including those in depositions or answers to interrogatories, may also be used as substantive evidence under the party admissions exception in K.S.A. 60-460(g). Likewise, there may be instances in which prior convictions involving dishonesty or false statement may be used not only for impeachment but also for a substantive purpose under K.S.A. 60-455.

Comment

As to evidence generally affecting credibility, see K.S.A. 60-420 and 60-422(c), (d); inconsistent statements, see K.S.A. 60-422(b); depositions, see K.S.A. 60-232; interrogatories, see K.S.A. 60-233; and crimes, see K.S.A. 60-421.

For rules as to scope of cross-examination affecting credibility, see *Sanders v. Sitton*, 179 Kan. 118, 292 P.2d 1099 (1956); *State, ex rel. Emery v. Christensen*, 132 Kan. 192, 294 P. 892 (1931).

The admissibility of evidence of a conviction is determined by whether the crime involves dishonesty or false statement and not upon the penalty imposed or whether the crime is a felony or a misdemeanor. In *Tucker v. Lower*, 200 Kan. 1, 434 P.2d 320 (1967), larceny and receiving stolen property were held to be crimes involving dishonesty or false statement, and drunkenness, reckless driving, allowing an unauthorized person to drive, and having an open bottle in a car were held not to be crimes involving dishonesty or false statement.

102.40**LIMITED ADMISSIBILITY OF EVIDENCE AS TO
ONE PARTY OR PURPOSE**

Whenever any evidence has been admitted only (*against one party*) (*for one purpose*) you should not consider it (*against any other party*) (*for any other purpose*).

Notes on Use

This written instruction should be given even though the court restricted the scope of consideration at the time evidence was admitted.

Comment

As to the obligation to instruct, see K.S.A. 60-406.

When evidence is introduced for a limited purpose, the trial court should explain the limitation to the jury and limit its application to that purpose. See *State v. Kidwell*, 199 Kan. 752, 434 P.2d 316 (1967) (Citing PIK 2.40 [now PIK 4th 102.40]).

The substance of this instruction is set out, applied, and approved in *Howard v. Stoughton*, 199 Kan. 787, 433 P.2d 567 (1967).

102.50

EXPERT WITNESS

Certain testimony has been given in this case by experts. Experts are persons who, from experience, education or training have specialized knowledge on matters not common to people in general. The law permits experts to give their opinions about such matters. The testimony of experts is to be considered like any other testimony and is to be evaluated by the same tests. You should consider it in connection with all the other facts and circumstances. You should give it the weight and credit you determine are appropriate.

Notes on Use

If this instruction is given, it should follow PIK 4th 102.20, Credibility of Witnesses.

Comment

See K.S.A. 60-456. A prior version of this instruction was held to be a correct statement of the law in *English Village Properties, Inc. v. Boettcher & Lieurance Constr. Co.*, 7 Kan. App. 2d 307, 314, 640 P.2d 1282 (1982).

Although the Kansas Supreme Court acknowledged a trend away from instructions that focus on the credibility of certain witnesses, *State v. Adams*, 292 Kan. 151, 165-166, 254 P.3d 515 (2011), held it was not error to add the prior version of this instruction to the general instructions on witness credibility in PIK Crim. 3d 52.09 [now PIK–Criminal 4th 51.060]. Doing so discouraged jurors from being overly impressed by the expertise and official positions of prosecution experts who were not opposed by a defense expert.

102.51**HYPOTHETICAL QUESTION****Comment**

The Committee recommends that no “hypothetical question” instruction be given.

102.60

ADMISSIONS

Comment

The Committee recommends that no “admissions” instruction be given.

D. PRESUMPTIONS**102.70****PRESUMPTION OF DUE CARE IN WRONGFUL DEATH CASE****Comment**

The Committee recommends that no instruction be given.

102.71

PRESUMPTION THAT PARTIES USED ORDINARY CARE

Comment

The Committee recommends that no instruction be given.

102.72

PRESUMPTION AGAINST SUICIDE

You must presume that _____ died of *(accidental) (natural)* causes unless you are persuaded by the evidence that *(he) (she)* took *(his) (her)* own life.

Comment

An instruction on this presumption would only be proper when the deceased was sane at the time of death. Kansas authorities are: *Hawkins v. New York Life Ins. Co.*, 176 Kan. 24, 269 P.2d 389 (1954); *Muzenich v. Grand Carniolian Slovenian Catholic Union*, 154 Kan. 537, 119 P.2d 504 (1941); *O'Brien v. New England Mut. Life Ins. Co.*, 109 Kan. 138, 197 P. 1100 (1921).

See *Peoples Bank of Pratt v. Integral Ins. Co.*, 251 Kan. 809, 840 P.2d 503 (1992) holding that the giving of an instruction on this presumption is not proper when there is eyewitness testimony about the cause of death.

102.73

**INFERENCES ARISING FROM FAILURE
TO PRODUCE EVIDENCE**

If you find there is evidence that would help explain an issue and that a party has control over that evidence, but has not presented it, you are to presume that the evidence is unfavorable to that party, unless you find that a reasonable excuse for not presenting the evidence has been shown.

Notes on Use

The Committee recommends that this instruction should seldom be given because these matters would be addressed in closing argument.

Comment

The cases addressing this presumption involve knowledge or information that the party himself had but did not disclose. In *Evenson Trucking Co. v. Aranda*, 280 Kan. 821, 127 P.3d 292 (2006), Aranda's failure to present a receipt he claimed existed "could create a presumption that no such evidence existed, or was adverse to him." In *Blackburn v. Colvin*, 191 Kan. 239, 380 P.2d 432 (1963), there was evidence that Colvin had created a dangerous condition on his property but Colvin didn't take the stand and deny it. The court concluded that the failure of a party to throw light upon an issue particularly within his knowledge raises a presumption that the concealed information is unfavorable to him. In *In re Estate of Grisell*, 176 Kan. 209, 270 P.2d 285 (1954), one of the opponents of a will testified and did not deny key evidence, the truth of which he would certainly know. The court found the failure to deny raised the presumption that his evidence on the subject would be unfavorable to his position. In *Henks v. Panning*, 175 Kan. 424, 264 P.2d 483 (1953), the defendants did not testify and, because they had within their own knowledge certain facts that went unexplained, the presumption that their testimony would not have been favorable to their position was invoked. In *Donley v. Amerada Petroleum Corp.*, 152 Kan. 518, 106 P.2d 652 (1940), a corporation failed to put on evidence of how long it had been emptying salt water into a creek, a subject that the court found to be peculiarly within the corporation's knowledge, and the presumption was therefore raised that the information was unfavorable to the corporation.

Although the preceding cases address the issue of the presumption, in none of these cases does it appear that any instruction regarding the presumption was given to the jury.

102.74**PRESUMPTION THAT MAIL WAS RECEIVED**

If mail was properly addressed, stamped, and deposited in the United States mails, you must presume that it was delivered to the addressee unless you are persuaded by the evidence that it was not delivered.

Notes on Use

If there is an issue as to whether the mail was properly addressed, stamped, or deposited, the instruction should be: “If you are persuaded that mail was properly addressed, stamped, and deposited in the United States mails, you must presume that it was delivered to the addressee unless you are persuaded by the evidence that it was not delivered.”

103.01**NEGLIGENCE DEFINED**

Negligence is the lack of reasonable care. It is the failure of a person to do something that a reasonable person would do, or doing something that a reasonable person would not do, under the same circumstances.

Notes on Use

“Guilt” or “guilty of negligence” should not be used in a civil case.

This definition of negligence is applicable when the standard of care or duty is ordinary or reasonable care. For other standards of care, the breach of which constitutes negligence, see:

PIK 4th 123.01-123.20, 123.40, 123.70, Professional Negligence

PIK 4th 128.01-128.06, Products Liability

PIK 4th 132.01-132.03, FELA

PIK 4th 141.01-141.02, Miscellaneous—Common Carriers

If negligence of a child is an issue, see PIK 4th 103.02, Negligence of Children, and PIK 4th 105.02, Comparative Fault Theory and Effect—Children.

In a comparative fault case, see PIK 4th 105.01, Comparative Fault Theory and Effect.

Comment

The general definition of negligence “is not designed as a specific rule where other standards of care, i.e., products liability, malpractice, etc., apply.” *Akins v. Hamblin*, 237 Kan. 742, 747, 703 P.2d 771 (1985). As a general rule, the presence or absence of negligence in any degree is not subject to determination by the court on summary judgment. Such a determination should be left to the trier of fact. Only when reasonable minds could not reach differing conclusions from the same evidence may the issue be decided as a question of law. *Gruhin v. City of Overland Park*, 17 Kan. App. 2d 388, 836 P.2d 1222 (1992).

In unique cases where the activities in question are addressed by published industry standards that are recognized as authoritative, the trial court may need to allow evidence of and instruct the jury as to the relevant industry standards so as to enable the jury to evaluate the degree of care owed by sponsors or participants in such activities. See *e.g.*, *Pullen v. West*, 278 Kan. 183, 201-206, 92 P.3d 584 (2004), a case involving the discharge of commercial fireworks at a private Fourth of July party. In addition, the trial court may also need to allow appropriate expert testimony as to which of such standards apply to the unique facts of the case. *Id.* at 210.

103.02

NEGLIGENCE OF CHILDREN

Negligence is the lack of reasonable care. It is the failure of a person to do something that a reasonable person would do, or doing something that a reasonable person would not do, under the same circumstances.

When you decide whether a child is negligent, you must consider the child's age, intelligence, abilities and experiences.

Notes on Use

In a comparative fault case, use the bracketed language in PIK 4th 105.01, Comparative Fault Theory and Effect, rather than this pattern instruction.

Comment

The common-law rule imposing arbitrary age classifications has been abrogated in Kansas. Ordinarily, the negligence of a child should be determined by the factfinder. *Honeycutt v. City of Wichita*, 247 Kan. 250, 796 P.2d 549 (1990), *appeal after remand* 251 Kan. 451, 836 P.2d 1128. But see *Williams v. Esaw*, 214 Kan. 658, 522 P.2d 950 (1974) (superseded by statute on other grounds as stated in *Eli v. Board of Sedgwick County Comm'rs*, 235 Kan. 684, 681 P.2d 673 (1984)), which holds that a minor driving an automobile is held to the same standard as an adult. Under such circumstances, neither this instruction nor PIK 4th 105.02, Comparative Fault Theory and Effect—Children, should be given.

As to the standard of conduct required of a child driving an automobile, authority is divided, but one modern view is that where a child engages in an activity which is normally undertaken by adults, and for which adult qualifications are required, the child is required to exercise that degree of care ordinarily expected of an adult. See Age of minor operator of automobile or other motor-powered vehicle or craft as affecting primary or contributory negligence, 97 A.L.R. 2d 872. Kansas appears to have held to the contrary in *Harvey v. Cole*, 159 Kan. 239, 153 P.2d 916 (1944) (disapproved in *Williams v. Esaw*, 214 Kan. 658, 522 P.2d 950 (1974)). In *Allen v. Ellis*, 191 Kan. 311, 317, 380 P.2d 408 (1963), however, the Kansas court decided that “There is nothing in the Uniform Operators’ and Chauffeurs’ License Act.... that makes any exception to the standard of care and caution required as between minors and adults.”

103.03**WANTON CONDUCT DEFINED**

Wanton conduct is doing something knowing that it is dangerous, and either being completely indifferent to the danger or recklessly disregarding the danger.

Notes on Use

A definition of wanton conduct will be required when punitive damages are claimed based on wantonness. *Folks v. Kansas Power & Light Co.*, 243 Kan. 57, 74, 755 P.2d 1319 (1988), *overruled on other grounds*, *York v. Intrust Bank*, 265 Kan. 271, 962 P.2d 405 (1998); *Lutz v. Independent Construction Co.*, 183 Kan. 798, 332 P.2d 269 (1958). See PIK 4th 171.44 on punitive damages.

103.04

WILLFUL CONDUCT DEFINED

Willful conduct is intentionally or purposefully doing wrong or causing injury to another.

Notes on Use

For authority, see *Anderson v. White*, 210 Kan. 18, 499 P.2d 1056 (1972).

Although the words “willful and wanton” are often used together, the Committee is of the opinion that willful conduct is different than wanton conduct, and that a separate instruction is justified.

103.05**MALICE DEFINED**

Malice is the intent to do harm without any reasonable justification or excuse.

Comment

In *T.H. and C.C. v. University of Kansas Hosp. Auth.*, 53 Kan. App. 2d 332, 388 P.3d 181 (2017), a medical malpractice case, the court cited this instruction with approval.

103.06

NUISANCE DEFINED

A nuisance is a condition created or maintained that unreasonably interferes with the personal rights or property rights of another and that causes harm, inconvenience, or damage.

Comment

See Comments to PIK 4th 126.65, Municipalities—Nuisance, and PIK 4th 127.90, Private Nuisance—Intentional, for illustrative cases involving the concept of nuisance.

104.01

CAUSATION DEFINED

Comment

The Committee recommends that no instruction be given defining causation.

In *Southgate Bank v. Fidelity & Deposit Co. of Maryland*, 14 Kan. App. 2d 454, 794 P.2d 310 (1990), the court, seemingly in agreement with the recommendation of the PIK Committee that no instruction be given to define “causation,” notes that the trial court’s use of the phrase “direct cause” needs no definition and is not a difficult term for a jury to understand.

In *Cullip v. Domann*, 266 Kan. 550, 972 P.2d 776 (1999), the Supreme Court affirmed the trial court’s decision to grant summary judgment to a juvenile who failed to warn the plaintiff that another juvenile was not observing gun safety. The court held that the defendant’s failure to take a hunter safety course as required by law was negligence per se, but stated, “Liability in damages cannot be predicated on a violation of statute unless the breach of law is the proximate cause of the injury or damages, or substantially contributes thereto.” *Cullip* at 555.

Proximate cause is almost, but not quite, obsolete as a consideration in negligence cases in Kansas. In *Reynolds v. Kansas Dept. of Transportation* 273 Kan. 261, 268-69, 43 P.3d 799 (2002), the Supreme Court stated, “[s]ince adoption of comparative negligence in 1974, Kansas courts compare the percentages of fault of all alleged wrongdoers. K.S.A. 60-258a. Proximate cause is not an obsolete concept in Kansas law, but when it has been mentioned by this court in recent years it typically has been in a criminal context . . . With the adoption of comparative fault, Kansas has moved beyond the concept of proximate cause in negligence.”

However, Phoenix-like, the concept regularly arises from its own ashes. In *Hale v. Brown*, 287 Kan. 320, 323, 197 P.3d 438 (2008), the Supreme Court said, “This court has continued, however, to adhere to the common-law requirement of proximate cause.” See also *Zimmerman v. Brown*, 49 Kan. App. 2d 143, 306 P.3d 306, *rev. denied* 298 Kan. 1209 (2013); *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012); *Deal v. Bowman*, 286 Kan. 853, 188 P.3d 941 (2008); *Esquivel v. Watters*, 286 Kan. 292, 183 P.3d 847 (2008); *Yount v. Diebert*, 282 Kan. 619, 147 P.3d 1065 (2006); and *D.W. v. Bliss*, 279 Kan. 726, 112 P.3d 232 (2005).

In *Drouhard-Nordhus v. Rosenquist*, 301 Kan. 618, 345 P.3d 281 (2015), the Supreme Court upheld a district court order granting summary judgment to a physician in a medical malpractice action. The court specifically based its holding on the failure of the plaintiff to make a showing of proximate cause linking the alleged medical malpractice to the claimed injury. See also *Siruta v. Siruta*, 301 Kan. 757, 766, 348 P.3d 549 (2015) (citing proximate cause as a necessary element of a *prima facie* case of negligence in a wrongful death action).

104.02

CONCURRENT CAUSES

An injury may be caused by more than one negligent act. Such acts are known as concurrent causes. Such acts need not occur at the same time. When concurrent negligent acts of two or more persons cause an injury, each person is at fault.

Notes on Use

The Committee believes that the applicable instructions in Chapter 105 are normally sufficient and that the above instruction should seldom be given.

Comment

In *Cox v. Lesko*, 263 Kan. 805, 953 P.2d 1033 (1998), the court held that a patient's fault in failing to undergo post-operative physical therapy could be compared with the malpractice of the physician in performing the surgery. In view of the breadth of the concept of comparative fault illustrated by *Cox v. Lesko*, it seems rarely useful for a jury in a negligence case to consider whether a cause is concurrent.

In *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 228 P.3d 1048 (2010), a medical malpractice case, the Supreme Court stated that a negligent health care provider cannot be held solely liable for subsequent negligence of other treating health care providers. If successive negligent actions of more than one health care provider combined to cause an injury, the liability of each care provider must be allocated based on comparative fault.

104.03**SUPERSEDING CAUSE**

When an injury is caused by unrelated acts occurring at different times, you must consider whether the last act alone would have caused the injury. If so, the person committing the first act is not at fault, unless the last act could have reasonably been foreseen by the person responsible for the first act.

Notes on Use

The Committee believes that the applicable instructions in Chapter 105 are normally sufficient and that the above instruction should seldom be given.

Comment

In *Steele v. Rapp*, 183 Kan. 371, 383, 327 P.2d 1053 (1958), cited with approval in *Barkley v. Freeman*, 16 Kan. App. 2d 575, 581, 827 P.2d 774 (1992), the court held that if “two distinct successive causes, unrelated in their operation, conjoin to produce a given injury, the question of remote and proximate cause becomes one of law for the decision of the court, and not a question of fact for determination by a jury.” If the trial court does not exclude the subsequent occurrence as a matter of law, then it is rarely useful for a jury, in a negligence case, to decide whether the act is a “concurrent” or “superseding” cause. Rather, the applicable instructions in Chapter 105 should be adequate.

In *Tinkler v. U.S. by F.A.A.*, 982 F.2d 1456, 1467 (10th Cir. 1992), PIK 2d 5.03 [PIK 4th 104.03] is cited as the proper standard in Kansas for determining when an intervening cause is a superseding cause. The court found that an air traffic control specialist negligently failed to provide weather information to a pilot whose plane subsequently crashed. The pilot was also found to be negligent for continuing his flight without the weather information. The court held that the pilot’s negligence was an intervening and superseding cause of the crash, since the negligent acts of the pilot were not foreseen by or reasonably foreseeable to the air traffic control specialist.

In *Reynolds v. Kansas Dept. of Transportation*, 273 Kan. 261, 268-269, 43 P.3d 799 (2002), the court acknowledged that intervening and superseding causes are still recognized in extraordinary cases.

105.01**COMPARATIVE FAULT THEORY AND EFFECT**

You must decide this case by comparing the fault of the parties. In doing so, you will need to know the meaning of the terms “negligence” and “fault.”

Negligence is the lack of reasonable care. It is the failure of a person to do something that a reasonable person would do, or it is doing something that a reasonable person would not do, under the same circumstances.

[When you decide whether a child is negligent, you must consider the child’s age, intelligence, abilities and experiences.]

A party is at fault when he or she is negligent and that negligence caused or contributed to the event which brought about the claim(s) for damages.

I am required to reduce the amount of damages you may find for any party by the percentage of fault, if any, that you find is attributable to the party.

A party will be able to recover damages only if that party’s fault is less than 50 percent of the total fault assigned. A party will not be able to recover damages, however, if that party’s fault is 50 percent or more.

Notes on Use

This instruction should be used in every comparative fault case. In cases involving the comparative negligence of child drivers, the bracketed language should not be used. See Section 19 of the Comment below. In a medical negligence case in which expert testimony establishes the standard of care for all parties, the applicable standard of care instruction from PIK 4th Civil, Chapter 123 should be substituted for the definition of negligence in this instruction. See *Biglow v. Eidenberg*, 308 Kan. 873, 886, 424 P.3d 515 (2018).

Comment

In *Reynolds v. Kansas Dept. of Transportation*, 273 Kan. 261, 269, 43 P.3d 799 (2002), the court approved this instruction’s definition of “fault.” This definition of fault and negligence was reaffirmed in *Haley v. Brown*, 36 Kan. App. 2d 432, 140 P.3d 1051 (2006). The case also contains a brief, cogent explanation of the fundamental nature of comparative fault jurisprudence in Kansas.

In *Burnette v. Eubanks*, 308 Kan. 838, 850-852, 425 P.3d 343 (2018), the court held the language “caused or contributed to” in the instruction correctly permits a jury to find a defendant at fault only if the defendant’s negligence had a share in producing the injury.

The concept of comparative fault as applied to all causes of action based on negligence was adopted by the legislature by the enactment of K.S.A. 60-258a in 1974. K.S.A. 60-258b provides that the act does not apply to any cause of action that accrued prior to July 1, 1974. The statute is entitled comparative negligence. Since its enactment, the concept has been extended to include comparative fault in non-negligence cases by judicial decision.

In *Nail v. Doctor's Bldg., Inc.*, 238 Kan. 65, 708 P.2d 186 (1985), the Supreme Court approved PIK 2d 20.01 [antecedent of PIK 4th 105.01].

In *Zak v. Riffel*, 34 Kan. App. 2d 93, 115 P.3d 165 (2005), the defendant physician sought to have the plaintiff's condition that caused the plaintiff to be under the physician's care to be considered as an element of fault on the part of the plaintiff. The Court of Appeals, citing PIK 3d 105.01 [now PIK 4th 105.01], stated that a patient's prior condition that caused or required him to be in the care of the defendant physician cannot be a basis for comparative fault in the negligence claim against the physician.

The Kansas appellate courts have by judicial decision adopted certain basic principles to be applied in comparative fault cases. The principles are as follows:

1. 49 Percent Rule—Equal Fault Bars Recover

The Kansas comparative fault system is based on the “less than” or the “49 percent rule.” The injured party may recover only where his fault was less than the fault of the party or parties against whom claim for recovery was made. If the plaintiff and defendant are equally at fault, there can be no recovery. These principles are discussed in *Negley v. Massey Ferguson, Inc.*, 229 Kan. 465, 625 P.2d 472 (1981).

2. Applicability to Non-Negligence Cases

The comparative negligence statute has been held to apply to claims based on liability theories other than common-law negligence. For example, in *Kennedy v. City of Sawyer*, 228 Kan. 439, 450, 618 P.2d 788 (1980), the comparative negligence statute was held applicable to claims based on strict liability or on breach of implied warranty in products liability cases. In *Wilson v. Probst*, 224 Kan. 459, 581 P.2d 380 (1978), it was held that the state's breach of its statutory duty to repair highways had to be considered in determining the comparative fault of the defendant's driver and the Department of Transportation in a claim for damages arising out of an automobile accident. See also *Thomas v. Board of Trustees of Salem Township*, 224 Kan. 539, 582 P.2d 271 (1978). Likewise, in *Arredondo v. Duckwall Stores, Inc.*, 227 Kan. 842, 610 P.2d 1107 (1980), comparative fault was held properly applied in an action by a negligent minor to recover from a defendant who sold explosives to the minor in contravention of a statutory prohibition. In *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, 628 P.2d 239 (1981), it is stated that in any situation where contributory negligence would have been a defense, comparative negligence now applies. There, comparative fault principles were applied where a nuisance had its origin in negligence.

If contributory negligence or an analogous defense would not have been a defense to a claim prior to the adoption of the comparative negligence statute, K.S.A. 60-258a, it does not apply following its adoption. Thus the statute is not applicable to suits based solely on contracts. *Federal Savings & Loan Ins. Corp. v. Huff*, 237 Kan. 873, 704 P.2d 372 (1985).

Where a breach of express or implied warranty causes death, personal injury or physical damage to property, the comparative fault statute applies. It was originally held that if the result is simple economic loss, liability and damages are governed by breach of contract principles. *Broce-O'Dell Concrete Products, Inc. v. Mel Jarvis Constr. Co.*, 6 Kan. App. 2d 757, Syl. 2, 634 P.2d 1142 (1981); *Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. 635, 643, 666 P.2d 192 (1983); see also *Circle Land and Cattle Corp. v. Amoco Oil Co.*, 232 Kan. 482, 487, 657 P.2d 532 (1983) (upholding jury determination

of comparative fault in a breach of implied warranty of fitness for a particular purpose involving property damage). This rule was changed effective July 1, 1987, when K.S.A. 60-258a was amended to include recovery based upon economic loss.

Intentional acts of a third party may not be compared with negligent acts of a defendant whose duty it is to protect the plaintiff from the intentional acts committed by the third party. *Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 819 P.2d 587 (1991); *Gould v. Taco Bell*, 239 Kan. 564, 722 P.2d 511 (1986).

An implied contract of indemnity may arise when one personally without fault is made to pay for the tortious acts of another. In such cases, the concept of comparative fault does not apply. To recover damages, the principal must be without fault. *Med James, Inc. v. Barnes*, 31 Kan. App. 2d 89, 100, 61 P.3d 86 (2003).

3. Special Verdicts with No General Verdict

The comparative fault statute declares categorically that no general verdict shall be returned by the jury. The jury is directed to return special verdicts determining the percentage of negligence attributable to each of the parties and determining the total amount of damages sustained by each of the claimants. After the special verdicts are received, the trial court will apply the statutory formula and enter judgment as required under the law. In *Scales v. St. Louis-San Francisco Ry. Co.*, 2 Kan. App. 2d 491, 500, 582 P.2d 300 (1978), an instruction advising the jury that the plaintiff's award of damages would be reduced by the ratio which his percentage of negligence bore to the total amount of negligence allocated among the plaintiff and defendants was approved. In *Thomas v. Board of Trustees of Salem Township*, 224 Kan. 539, 547, 582 P.2d 271 (1978), the court approved the use of this instruction. The last two paragraphs were challenged as prejudicial in that they informed the jury of the results of their verdict. The court found it preferable to let the judge explain the result rather than to allow the jury to speculate and possibly render a verdict on an erroneous speculation. If, however, the jury conspired to circumvent the law by increasing the amount of actual damages to a fictitious figure so as to give a negligent plaintiff his entire damages plus attorney fees, the verdict will be set aside. *Verren v. City of Pittsburg*, 227 Kan. 259, 607 P.2d 36 (1980). Likewise, a quotient verdict used in determining comparative fault will be set aside. *Johnson v. Haupt*, 5 Kan. App. 2d 682, 623 P.2d 537 (1981). In a comparative negligence case tried before the decision date of *Thomas v. Board of Trustees of Salem Township*, 224 Kan. 539, 582 P.2d 271 (1978), it was held not to be reversible error for the trial court to refuse to advise the jury of the legal consequences of its answers to special questions allocating fault. *Cook v. Doty*, 4 Kan. App. 2d 499, 608 P.2d 1028 (1980). In *Nail v. Doctor's Bldg., Inc.*, 238 Kan. 65, 708 P.2d 186 (1985), the Supreme Court held that it was error for the trial court to fail to give the concluding paragraph of PIK 2d 20.01 [PIK 4th 105.01] because the jury should be advised that equal or a greater percentage of fault bars a plaintiff from recovery.

4. Parties—Actual and Phantom

Subsection (d) of K.S.A. 60-258a provides that, on motion of any party against whom a claim is asserted for negligence, any other person whose causal negligence is claimed to have contributed to the injury shall be joined as an additional party to the

action. The statute does not state what happens if a claim for relief is not asserted by anyone against this new party. Formal joinder of some third person is not a prerequisite to consideration of that person's comparative fault. *Kennedy v. City of Sawyer*, 228 Kan. 439, 460, 618 P.2d 788 (1980); *Brown v. Keill*, 224 Kan. 195, 206, 580 P.2d 867 (1978).

Consideration of fault attributable to any third person claimed to be causally negligent is essential to the determination of the parties' liability, even though that third person cannot be joined formally as a litigant or may be immune or judgment proof. *Brown v. Keill*, 224 Kan. 195, 206, 580 P.2d 867 (1978); *Miles v. West*, 224 Kan. 284, 287, 580 P.2d 876 (1978); *Scales v. St. Louis-San Francisco Ry. Co.*, 2 Kan. App. 2d 491, 498, 582 P.2d 300 (1978).

In *Fitzpatrick v. Allen*, 24 Kan. App. 2d 896, 955 P.2d 141 (1998), the court held that the concept of parental immunity does not mean there is no duty, only that there is a prohibition against the recovery of damages if the duty is breached. Even if parental immunity shields a parent from liability for negligence, the jury may still consider the parent's fault under K.S.A. 60-258a.

As noted in *Brown*, Kansas adheres to the "phantom party" concept, requiring consideration of the proportionate responsibility of any third party claimed to be causally negligent even though that party "cannot be formally joined as a litigant or held legally responsible for his or her proportionate fault." See *Baird v. Phillips Petroleum Co.*, 535 F. Supp. 1371, 1378 (D. Kan. 1982); *Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. 635, 666 P.2d 192 (1983).

When defendant joins additional parties under K.S.A. 60-258a(c), who defendant claims contributed to plaintiff's injuries, defendant has the burden of proving the joined parties' fault by a preponderance of the evidence. *McGraw v. Sanders Co. Plumbing & Heating, Inc.*, 233 Kan. 766, 667 P.2d 289 (1983) (holding plaintiff entitled to instruction regarding defendant's burden of proof concerning additional parties). See also *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 412, 681 P.2d 1038 *cert. denied* [*Ortho Pharmaceutical Corp. v. Wooderson*] 469 U.S. 965, 105 S. Ct. 365, 83 L. Ed. 2d 301 (1984) (where there is no evidence of negligence on the part of a person, the question of that person's negligence need not be submitted to a jury).

The trial judge's decision to substitute the name of an individual nurse who was alleged to have acted negligently for the name of the named defendant hospital was held to be error, though it was harmless in that particular case, in *Haley v. Brown*, 36 Kan. App. 2d 432, 140 P.3d 1051 (2006). The court stated, "The plaintiff can choose the parties she wishes to sue, and the defendants can bring in others if they are considered to be at fault. The court has no authority to pick the parties." *Haley*, at 437.

5. Joint and Several Liability Abolished

Subsection (d) of K.S.A. 60-258a provides that where the comparative negligence of the parties is an issue and recovery is allowed against more than one party, each party shall be liable for that portion of a claimant's total damages in proportion to his percentage of causal negligence. This provision abolishes joint and several liability of multiple defendants in any comparative negligence case since the liability of each defendant must be compared and is limited to his portion of the total causal negligence attributed to all parties against whom recovery is allowed. *Wood v. Groh*, 269 Kan. 420, 7 P.3d 1163 (2000). See also *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980); *Miles v. West*, 224 Kan. 284, 580 P.2d 876 (1978).

The comparative fault statute has done nothing to change the common-law rule of joint and several liability for defendants in actions involving intentional torts. *Sieben v. Sieben*, 231 Kan. 372, 379-380, 646 P.2d 1036 (1982). Although enactment of comparative fault abolished joint and several liability, it was not error to instruct the jury the city had a nondelegable duty to keep its streets in reasonably safe condition. *Schmeck v. City of Shawnee*, 232 Kan. 11, 31-32, 651 P.2d 585 (1982). See also *Yount v. Deibert*, 282 Kan. 619, 147 P.3d 1065 (2006).

6. Failure of Party to Assert Claim as Res Judicata—The One Action Rule

In *Eurich v. Alkire*, 224 Kan. 236, 579 P.2d 1207 (1978), it was held that any named party who has been properly served with a summons and who fails to assert a claim against any party in a comparative negligence action is forever barred and may not assert the claim in a separate lawsuit. The court stated that it was the intent of the legislature for the parties to litigate all causes of action for negligence arising out of any occurrence in one action. Thus any claim for damages arising out of the collision or occurrence must be presented at the time the negligence is originally determined if the claimant is an actual party in the case. The court recognized, however, that a person who had not been made an actual party in a comparative negligence case is not bound by the judgment, even though his causal negligence may have been determined.

In an action brought before the Supreme Court on a certified question, it was held that in a damage suit the doctrine of comparative fault requires all of the parties to the occurrence to have their fault determined in one action. *Albertson v. Volkswagenwerk Aktiengesellschaft*, 230 Kan. 368, 634 P.2d 1127 (1981).

In *Mathis v. TG & Y*, 242 Kan. 789, 751 P.2d 136 (1988), the Supreme Court modified the rule of *Eurich v. Alkire*, 224 Kan. 236, 579 P.2d 1207 (1978), by holding that it was never the intent of the legislature to preclude a plaintiff from proceeding against a tortfeasor when there has been no judicial determination of comparative fault. In *Anderson v. Scheffler*, 242 Kan. 857, 752 P.2d 667 (1988), the Supreme Court held that where a plaintiff is prevented from joining a necessary party in federal court because of loss of diversity, the action against that party survives in state courts as an exception to the *Albertson* rule.

In *Mick v. Mani*, 244 Kan. 81, 766 P.2d 147 (1988), the Supreme Court discusses in depth the “one-action” rule in comparative negligence cases and the exceptions thereto. Simply stated, the court concludes that a plaintiff may pursue separate actions against tortfeasors where there has been no judicial determination of comparative fault.

In *Dodge City Implement, Inc. v. Board of Barber County Comm’rs*, 288 Kan. 619, 205 P.3d 1265 (2009), the Supreme Court stated that Kansas law requires defendants seeking to minimize their liability in comparative fault situations not involving a chain of distribution or similar commercial relationship to do so by comparing the fault of other defendants in order to reduce their own share of liability and damages. If a defendant chooses to settle and obtain release of common liabilities involving other parties whom the plaintiff did not sue, the defendant does not have an action for comparative implied indemnity or postsettlement contribution. Under Kansas comparative fault procedure, such a remedy is not necessary, and such an action defeats the policy of judicial economy, multiplying the proceedings from a single accident or injury.

For additional cases discussing the “one action” rule, see *Cook v. Freeman*, 16 Kan. App. 2d 555, 825 P.2d 1185 (1992); *Tersiner v. Gretencord*, 17 Kan. App. 2d 551, 840 P.2d 544 (1992); and *Chavez v. Markham*, 256 Kan. 859, 889 P.2d 122 (1995).

7. Active-Passive Negligence Distinction Abolished

In Syllabus 5 of *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980), the rule is stated that the statutory adoption of comparative negligence in Kansas has the effect of abrogating the concept of indemnification based on the dichotomy of active-passive negligence as conceptualized in *Russell v. Community Hospital Association, Inc.*, 199 Kan. 251, 428 P.2d 783 (1967). In Syllabus 6 of *Kennedy*, it is stated that in actions where comparative negligence is in issue, the court deals in percentages of causal responsibility, and distinctions between primary, secondary, active and passive negligence lose their previous identities. The nature of misconduct in such cases is to be expressed on the basis of comparative fault.

8. No Contribution Between Joint Tortfeasors

In a series of cases, the Supreme Court has held that under K.S.A. 60-258a, joint and several liability between joint tortfeasors is no longer applicable. The individual liability of each defendant for the payment of damages is to be based on proportionate fault, and contribution among joint judgment debtors is no longer required in such cases because separate individual judgments are to be rendered. *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980); *Wilson v. Probst*, 224 Kan. 459, 581 P.2d 380 (1978); *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978).

9. Effect of Release of One Tortfeasor on Other Tortfeasors

In *Mulroy v. Olberding*, 29 Kan. App. 2d 757, 30 P.3d 1050 (2001) rev. denied 273 Kan. 1036 (2002), the court noted that Kansas has adopted the “specific identity rule” for actions brought under K.S.A. 60-258a. In comparative negligence actions, releases utilizing general language no longer extinguish the potential liability of codefendants unless they are specifically named or identified or described by the terms of the release. See also *Luther v. Danner*, 268 Kan. 343, 995 P.2d 865 (2000); *Geier v. Wikel*, 4 Kan. App. 2d 188, 603 P.2d 1028 (1979).

10. Implied Comparative Indemnity Between Tortfeasors

In *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980), the Supreme Court adopted the concept of comparative implied indemnity between joint tortfeasors. Where a settlement for plaintiff’s entire injuries or damages has been made by one tortfeasor during the pendency of a comparative negligence action and a release of all liability has been given by plaintiff to all who may have contributed to the damages, an apportionment of responsibility can then be pursued in the action by the tortfeasor who has settled claimant’s claim. In such an action for apportionment of responsibility, the settling tortfeasor is required to establish the reasonableness of the amount of the settlement and that there was a reasonable basis for his legal liability for the injuries and damages. The advantage of this rule is that one of the joint tortfeasors may pay off the plaintiff in full and thus fully satisfy the plaintiff’s claim. The defendant joint tortfeasors may then litigate the apportionment of responsibility among themselves.

A defendant, who settled with plaintiff, may not proceed against a co-defendant in a suit for comparative implied indemnity where the co-defendant was not subject to

actual liability, because plaintiff made no claim against the defendants and the statute of limitations for any claim by plaintiff had passed. *Ellis v. Union Pacific R.R. Co.*, 231 Kan. 182, 184-192, 643 P.2d 158 (1982). See also *Teepak, Inc. v. Learned*, 237 Kan. 320, 699 P.2d 35 (1985).

In *Dodge City Implement, Inc. v. Board of Barber County Comm'rs*, 288 Kan. 619, 205 P.3d 1265 (2009), the Supreme Court stated that Kansas law requires defendants seeking to minimize their liability in comparative fault situations not involving a chain of distribution or similar commercial relationship to do so by comparing the fault of other defendants in order to reduce their own share of liability and damages. If a defendant chooses to settle and obtain release of common liabilities involving other parties whom the plaintiff did not sue, the defendant does not have an action for comparative implied indemnity or postsettlement contribution. Under Kansas comparative fault procedure, such a remedy is not necessary, and such an action defeats the policy of judicial economy, multiplying the proceedings from a single accident or injury.

11. Workers Compensation Subrogation Rights of Negligent Employer

In *Negley v. Massey Ferguson, Inc.*, 229 Kan. 465, 625 P.2d 472 (1981), two workmen were electrocuted on the job when a forklift came in contact with an overhead power line owned and maintained by the Kansas Power and Light Company. The widows of these workmen were awarded workers compensation benefits. The two widows brought wrongful death actions against the manufacturer of the forklift and against KP & L. The jury returned verdicts finding that one of the decedent employees was 22% negligent, Orlan, Inc., the employer was 68% negligent, and KP & L was 10% negligent. Orlan, Inc. claimed subrogation rights under the provisions of the Workers Compensation Act, K.S.A. 44-504(b). The court reasoned that the extent and nature of the subrogation rights of an employer under the workers compensation statute are matters for legislative determination. K.S.A. 44-504 provides for full subrogation and provides no reduction in the amount of the subrogation regardless of the percentage of contributory negligence attributable to the employer. The court recognized the inequities in the result but felt obligated to enforce the clear provisions of the statute. It held any changes in this rule would have to be accomplished by the state legislature.

The inequities created by the conflict between the Workers Compensation Act and comparative fault were corrected by the enactment of K.S.A. 44-504(d) in 1982. The employer's subrogation interest is diminished by the percentage of damage award attributed to the negligence of the employer or those for whom the employer is responsible, other than the injured worker. *McGraw v. Sanders Co. Plumbing & Heating, Inc.*, 233 Kan. 766, 768, 667 P.2d 289 (1983) (holding the trial court properly denied admission of workers compensation lien).

12. Assumption of Risk

"[O]ur review of the caselaw now convinces us the doctrine's retention in Kansas runs counter to the approach taken in the vast majority of comparative fault jurisdictions, which eliminated assumption of risk after comparative fault was adopted. . . . We hold the comparative fault statute should control, and now overrule our prior caselaw adhering to the assumption of risk doctrine as an absolute bar to recovery." *Simmons v. Porter*, 298 Kan. 299, 300, 312 P.3d 345 (2013).

13. Nonapplicability to Bailment Cases

Comparative fault does not change the law of bailment. In an action by a bailor against a bailee for loss of property occasioned by theft, the fault of the thief should not be compared with the negligence of the bailee. *M. Bruenger & Co., Inc. v. Dodge City Truck Stop, Inc.*, 234 Kan. 682, 684, 675 P.2d 864 (1984).

14. The Rescue Doctrine

In *Bridges v. Bentley*, 244 Kan. 434, 769 P.2d 635 (1989), it was held that the rescue doctrine in negligence cases has not been abrogated by the enactment of the comparative negligence statute.

15. Intentional Acts of a Third Party

Intentional acts of a third party may not be compared with negligent acts of a defendant whose duty it is to protect the plaintiff from the intentional acts committed by the third party. *Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 819 P.2d 587 (1991); *Gould v. Taco Bell*, 239 Kan. 564, 722 P.2d 511 (1986).

16. The Relation Between Comparative Fault and Mitigation of Damages

In *Cox v. Lesko*, 263 Kan. 805, 953 P.2d 1033 (1998), the Supreme Court held that a patient's fault in failing to undergo physical therapy could be compared with the negligence of the physician in performing the surgery rather than being considered under a mitigation of damages concept.

17. The Relation Between Comparative Fault and the Maximum Permissible Recovery for Nonpecuniary Damages in an Action for Wrongful Death Under K.S.A. 60-1903.

In *Gann v. Joeckel*, 20 Kan. App. 2d 136, 141, 884 P.2d 451 (1994), the court held that in applying the comparative negligence statute, K.S.A. 60-258a, in an action for wrongful death due to an automobile accident brought under K.S.A. 60-1901 et seq., the percentages of causal fault attributable to any direct negligence of the decedent or the plaintiff are to be used to reduce the amount of damages awarded by the court or jury for nonpecuniary damages, rather than to reduce the maximum permissible recovery for nonpecuniary damages allowable under K.S.A. 60-1903.

The decision follows the reasoning in *McCart v. Muir*, 230 Kan. 618, 629, 641 P.2d 384 (1982), and *Bright v. Cargill, Inc.*, 251 Kan. 387, 415, 837 P.2d 348 (1992). The decision in *Gann* was approved in *Dickey v. Daughety*, 260 Kan. 12, 917 P.2d 889 (1996).

Where the jury award for nonpecuniary damages attributable to the defendant exceeds the cap, the court shall enter a judgment against the defendant for nonpecuniary damages in an amount equal to the maximum allowable under the cap. A settlement with a defendant who might be held liable for a proportional share of the damages for

wrongful death has no effect on the plaintiff's right to recover judgment. *Adams v. Via Christi Regional Medical Center*, 270 Kan. 824, 19 P.3d 132 (2001).

18. Subsequent Remedial Conduct

DiPietro v. Cessna Aircraft Co., 28 Kan. App. 2d 372, 16 P.3d 986 (2000), held evidence of subsequent remedial conduct cannot be introduced by the plaintiff to rebut the defendant's evidence of the plaintiff's comparative fault.

19. Comparative Fault of a Child

The common-law rule imposing arbitrary age classifications has been abrogated in Kansas. "A child is required to exercise that degree of care and caution ordinarily exercised by children of like age, intelligence, capacity, and experience under the circumstances then existing." *Honeycutt v. City of Wichita*, 247 Kan. 250, Syl. ¶ 3, 796 P.2d 549 (1990). The *Honeycutt* court further stated that ordinarily the negligence of a child should be determined by the factfinder. But see *Williams v. Esaw*, 214 Kan. 658, 522 P.2d 950 (1974), which holds that a minor driving an automobile is held to the same standard as an adult. Under such circumstances, neither the bracketed language regarding a child nor PIK 4th 103.02 should be given.

20. Proximate Cause

In *Hale v. Brown*, 287 Kan. 320, 197 P.3d 438 (2008), the Supreme Court ruled that comparative fault, as adopted in Kansas, did not do away with the requirement that proximate cause exist between the act complained of and the damages sought.

21. Medical Malpractice Cases

In *Maunz v. Perales*, 276 Kan. 313, 76 P.3d 1027 (2003), comparative negligence principles were applied to medical malpractice cases. The court stated that if a mentally disturbed patient is capable of exercising care for himself, that patient must act reasonably considering the reduced capacity exercised. The court affirmed the long standing rule that in medical malpractice settings, juries may consider proof of the patient's fault where health care providers have not fully assumed the patient's duty of self care.

In *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 228 P.3d 1048 (2010), a medical malpractice case, the Supreme Court stated that a negligent health care provider cannot be held solely liable for subsequent negligence of other treating health care providers. If successive negligent actions of more than one health care provider combined to cause an injury, the liability of each care provider must be allocated based on comparative fault.

105.02

COMPARATIVE FAULT THEORY AND EFFECT—CHILDREN

Comment

This instruction has been deleted. This issue is now handled in PIK 4th 105.01, and a separate instruction is not warranted.

105.03**COMPARATIVE FAULT—EXPLANATION OF VERDICT**

When answering questions on the verdict form, you should keep the following things in mind:

Fault

- 1. Your first obligation is to determine if any party is at fault.**
- 2. If you decide that any person is at fault, you must then assign a percentage of fault to each party you find to be at fault.**
- 3. For a person not at fault, show 0% on the verdict form.**
- 4. If you find any person at fault, show 1% to 100% on the verdict form for that person.**
- 5. If one or more persons are assigned fault, the total of all fault must be 100%.**

Amount of Damages

- 1. You are to determine the total amount of damages of each party claiming damages.**
- 2. Your determination of damages must be made without regard to the percentage of fault you may have assigned to that party.**
- 3. The Court will make any reduction of the damages necessary for the assigned percentage of fault. You should not do so.**

You may assign fault to:

The parties you may find received damages are:

Notes on Use

This instruction applies to all causes of action where there is a question of more than one of the parties being negligent.

All parties to the action should be listed in the blanks indicating to whom fault may be assigned. These parties should include any absent tortfeasor whose negligence must be determined to enable the court to grant judgment in proportion to the causal negligence of the parties under K.S.A. 60-258a(d). Where a known participant in the occurrence has obtained a covenant not to sue or release and is therefore not a party to the case, his or her proportionate fault may be considered by the jury.

In the blanks indicating parties that may be found to have received damages, there should be included the names of any party who asserts a claim for damages against any other party and where there is evidence to support the claim. For cases in which a liability is not an issue, see PIK 4th 106.05, Liability Directed. When damages are not an issue, see PIK 4th 171.41, Damages Not an Issue.

105.04**COMPARATIVE FAULT—WHERE CLAIM IS MADE AGAINST
ONE NOT JOINED AS A PARTY**

In this case it is claimed that _____ was at fault in the (collision) (occurrence) in question. Even though (he has) (she has) (they have) not appeared or offered evidence, it is necessary that you determine whether _____ was at fault in the (collision) (occurrence) and determine the percentage of fault, if any, attributable to (him) (her) (them).

Notes on Use

The name or names of those not joined as a party whose fault must be determined should be supplied in the blanks.

Subsections (b) and (d) of K.S.A. 60-258a require that the jury shall determine the percentage of negligence attributable to each of the parties.

Comment

A party to the action may claim that a person or persons other than the parties to the action caused or contributed to the injury and damage claimed. That person's percentage of fault must be taken into consideration in determining the total fault even though he is not joined as a party. All those causally negligent must be considered. *Kennedy v. City of Sawyer*, 228 Kan. 439, 460, 618 P.2d 788 (1980); *Brown v. Keill*, 224 Kan. 195, 206, 580 P.2d 86 (1978).

Where the evidence warrants it, the court must add that person as a party solely for the purpose of determining and allocating fault upon a one hundred percent basis. This is done by giving the above instruction and including these persons in the special verdict form.

This situation may exist where a contributing tortfeasor was given a release with reservations, a covenant not to sue, or may be unavailable as a party for lack of jurisdiction or unidentifiability, such as a phantom driver. A settling tortfeasor or absent tortfeasor is a party only for the purpose of allocation of percentage of fault. *Geier v. Wikel*, 4 Kan. App. 2d 188, 603 P.2d 1028 (1979).

The Kansas Supreme Court in *Gaulden v. Burlington Northern, Inc.*, 232 Kan. 205, 215-16, 654 P.2d 383 (1982), reversed the trial court for failing to submit a settling tortfeasor's negligence to the jury.

The Kansas Court of Appeals rejected the defendant's argument that only defendants may request nonparty comparative fault instructions, holding that a trial court should allow the jury to apportion fault among all potential tortfeasors where the evidence so requires, regardless of which party requests the instructions. Here, the trial court committed reversible error in denying the plaintiff's request to compare the negligence of nonparty doctors. *Dickerson v. St. Luke's South Hospital, Inc.*, 51 Kan. App. 2d 337, 346 P.3d 1100 (2015).

105.05**COMPARATIVE FAULT—BASIS OF COMPARISON**

The percentage of fault of a person is not determined merely by the number of negligent acts that person committed.

You must decide whether one person's negligence contributed more to the event that brought about damages than any negligence committed by another person.

Notes on Use

Ordinarily this instruction need not be given as a part of the initial instructions to the jury. It may be used, however, where made desirable by reason of argument of counsel or where the jury following retirement to the jury room seeks additional guidance as to the manner in which the percentages of fault should be determined.

Comment

The jury is not required to attribute the same percentage of negligence to two participants of a vehicle accident merely because they are each chargeable with the same category of negligence. For example, the jury is not required to equate the negligent lookout of one participant with the negligent lookout of the other. *Winkler v. State Farm Mutual Auto. Ins. Co.*, 11 Wis.2d 170, 105 N.W.2d 302 (1960).

In *Reynolds v. Kansas Dept. of Transportation*, 273 Kan. 261, 269, 43 P.3d 799 (2002), the court implied approval of this instruction when it stated: "A jury is instructed to 'weigh the respective contributions of the parties' in making the apportionment of percentage of fault. PIK 3d Civil 105.05."

105.06**COMPARATIVE FAULT—FAULT DIRECTED BY COURT—
ADMITTED OR STIPULATED ISSUE****Comment**

This instruction has been deleted. When liability is not an issue, see PIK 4th 106.05, Liability Directed. When damages are not an issue, see PIK 4th 171.41, Damages Not an Issue.

106.01

**ISSUES AND BURDEN OF PROOF—PLAINTIFF’S CLAIM—
DEFENDANT’S DEFENSE****1. The plaintiff claims:**

[that *(he)* *(she)* was injured due to the defendant’s fault in the following respects: (Set forth concisely the specific grounds of negligence that are supported by the evidence)].

[that *(he)* *(she)* was damaged due to the defendant’s *(breach of contract)* *(fraud)* *(breach of warranty)* in the following respects: (Set forth concisely the specific grounds of *(breach of contract)* *(fraud)* *(breach of warranty)* that are supported by the evidence)].

2. The plaintiff’s burden of proof:

The plaintiff has the burden to prove that *(his)* *(her)* claims in paragraph (1) are more probably true than not true. [It is not necessary that each of you agree upon a specific claim.]

3. The defendant admits:

[State briefly any facts admitted or not disputed.]

4. The defendant denies:

[that *(he)* *(she)* was at fault.]

[that plaintiff was injured or damaged to the extent claimed.]

[generally, plaintiff’s claims.]

5. The defendant claims:

[that the plaintiff was at fault in the following respects: (Set forth concisely the specific grounds of negligence that are supported by the evidence)].

6. The defendant’s burden of proof:

The defendant has the burden to prove that *(his)* *(her)* claims in paragraph (5) are more probably true than not true. [It is not necessary that each of you agree upon a specific claim.]

Notes on Use

This instruction must be given in every case. However, due to the variety of claims and legal theories that can be presented in a civil case, the instruction must be adapted to fit the issues in a particular case.

Comment

Jury instructions that fail to properly inform the jury of each party's burden to prove their respective claims and affirmative defenses are clearly erroneous. *Zak v. Riffel*, 34 Kan. App. 2d 93, Syl. ¶ 6, 115 P.3d 165 (2005).

106.02**ISSUES AND BURDEN OF PROOF—COUNTERCLAIM****Notes on Use**

The instruction appearing in the original volume of PIK under this title has been deleted because of the advent of comparative fault. See Chapter 191.00, Illustrative sets of Instructions, for examples of issue instructions in comparative fault cases. For counterclaims, cross claims or third party claims in cases other than those based on negligence, additional paragraphs may be added setting out the contentions of the parties, using the outline found in PIK 4th 106.01, Issues and Burden of Proof—Plaintiff's Claim—Defendant's Defense.

106.03

**ISSUES AND BURDEN OF PROOF—CROSS CLAIM—
THIRD PARTY CLAIM**

Notes on Use

See the Notes on Use to PIK 4th 106.02, Issues and Burden of Proof—Counterclaim.

106.04**LIABILITY ADMITTED**

The defendant admits liability for any damages that may be owed to the plaintiff in this case.

You must decide the amount of damages the plaintiff may be awarded.

The defendant's admission of liability must not influence your decision on the amount of damages that may be awarded to the plaintiff.

Notes on Use

If this instruction is applicable, it may be given to the jury at the beginning of the trial with other preliminary instructions and must be given at the end of the trial with the final instructions.

106.05

LIABILITY DIRECTED

The court has ruled that the defendant is liable for any damages that may be owed to the plaintiff.

You must decide the amount of damages the plaintiff may be awarded.

The court's ruling on liability must not influence your decision on the amount of damages that may be awarded to plaintiff.

Notes on Use

This instruction is recommended if the trial court has ruled in favor of the plaintiff on the issue of liability.

107.01

PRINCIPAL/AGENT RELATIONSHIP

An (*agent*) (*employee*) is a person who agrees to perform services for another. The (*principal*) (*employer*) is the person for whom the services are to be performed. Their agreement may be written, oral, or implied by the behavior of the parties. Compensation for the services is not required.

Notes on Use

This instruction should be given only when there is an issue as to the existence of an agency.

Comment

Agency refers to a fiduciary relationship by which a party, the “principal,” confides to another, the “agent,” the management of some business to be transacted by the agent on behalf of the principal. The fundamental concept of agency is that the principal delegates to the agent the authority to act on behalf of the principal in performing an act, in a lawful manner, that the principal could have lawfully performed. Therefore the act of the agent becomes the act of the principal. An element of the relationship is that the principal exercises some degree of control over the conduct and activities of the agent.

An agency relationship has been defined as a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name, or on his account, and by which that other assumes to do the business and to render an account of it. *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 238 Kan. 384, 710 P.2d 1297 (1985).

The issues to be considered in determining whether an agency relationship exists are summarized in *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975), where the court held:

“The law recognizes two distinct types of agencies—one actual, and the other ostensible or apparent. What constitutes agency and whether there is any competent evidence reasonably tending to prove such a relationship is a question of law. (*Greep v. Bruns*, 160 Kan. 48, 159 P.2d 803 [1945]; *Shugar v. Antrim*, 177 Kan. 70, 276 P.2d 372 [1954]; *Hendrix v. Phillips Petroleum Co.*, 203 Kan. 140, 453 P.2d 486 [1969].)

“To determine whether the record establishes an agency by agreement it must be examined to ascertain if the party sought to be charged as principal has delegated authority to the alleged agent by words which expressly authorize the agent to do the delegated act. If there is evidence of that character, the authority of the agent is express. If no express authorization is found, then the evidence must be considered to determine whether the alleged agent possesses implied powers. The test utilized by this court to determine if the alleged agent possesses implied powers is whether, from the facts and circumstances of the particular case, it appears there was an implied intention to create an agency; in which event, the relation may be held to exist, notwithstanding either a denial by the alleged principal, or whether the parties understood it to be an agency. (*Rodgers v. Arapahoe Pipe Line Co.*, 185 Kan. 424, 345 P.2d 702 [1959].) In C.J.S., Agency page 626 § 52, it is stated:

‘An implied agency must be based on facts for which the principal is responsible. These facts must, in the absence of estoppel, be such as to imply

an intention to create the agency, and the implication must arise from a natural and reasonable, and not from a forced, strained, or distorted, construction of them. They must lead to the reasonable conclusion that mutual assent exists, and be such as naturally lead another to believe in and to rely on the agency. The existence of the relation will not be assumed.

‘While the relation may be implied from a single transaction, it is more readily inferable from a series of transactions.

‘On the question of implied agency, it is the manifestation of the alleged principal and agent as between themselves that is decisive, and not the appearance to a third party or what the third party should have known. An agency will not be inferred because a third person assumed that it existed, or because the alleged agent assumed to act as such, or because the conditions and circumstances were such as to make such an agency seem natural and probable and to the advantage of the supposed principal, or from facts which show that the alleged agent was a mere instrumentality.

‘The existence of a valid express contract for services as an agent precludes the implication of a contract covering the same subject-matter, and resort to an express provision in a contract relative to agency precludes any determination that there was an implied agency.’

“The doctrine of apparent or ostensible authority is predicated upon the theory of estoppel. An ostensible or apparent agent is one whom the principal has intentionally or by want of ordinary care induced and permitted third persons to believe to be his agent even though no authority, either express or implied, has been conferred upon him. (*Greep v. Bruns*, supra; *Theis v. duPont, Glore Forgan, Inc.*, 212 Kan. 301, 510 P.2d 1212 [1973].)

“Ratification is the adoption or confirmation by a principal of an act performed on his behalf by an agent which act was performed without authority. The doctrine of ratification is based upon the assumption there has been no prior authority, and ratification by the principal of the agent’s unauthorized act is equivalent to an original grant of authority. Upon acquiring knowledge of his agent’s unauthorized act, the principal should promptly repudiate the act; otherwise it will be presumed he has ratified and affirmed the act. (*Theis v. duPont, Glore Forgan Inc.*, supra, and cases cited therein.) Knowledge of the unauthorized act is essential for the principal to ratify the act, and must be shown or facts proved that its existence is a necessary inference therefrom.

“The liability of a principal for the negligent acts of his agent is determined by whether the agent was engaged in the furtherance of the principal’s business to such a degree that the principal had the right to direct and control the activities of the agent. (*Hughes v. Jones*, 206 Kan. 82, 476 P.2d 588 [1970].) Liability of the principal is grounded upon the doctrine of respondeat superior. (*Jacobson v. Parrill*, 186 Kan. 467, 351 P.2d 194 [1960].) The primary factor to be considered is the control which the principal has over the agent.” *Brown*, 217 Kan. at 286-288.

See also *Highland Lumber Co., Inc. v. Knudson*, 219 Kan. 366, 548 P.2d 719 (1976).

In *Foley Co. v. Scottsdale Ins. Co.*, 28 Kan. App. 2d 219, 15 P.3d 353 (2000), the court held that “[u]nder agency law, once a principal knows of an agent’s unauthorized actions, it cannot sit back and see if it will benefit or suffer from the agent’s actions. Instead, a principal who receives notice of an unauthorized act of an agent must promptly repudiate the agent’s actions or it is presumed that the principal ratified the act. Ratification is the adoption or confirmation by a principal of an unauthorized act performed on its behalf by an agent. *Theis v. duPont, Glore Forgan Inc.*, 212 Kan. 301, 510 P.2d 1212 (1973).”

Generally, a principal's ratification of an unauthorized act is ratification of the whole act. However, where a plaintiff ratified his attorney's unauthorized settlement of a claim, the ratification did not extend to the attorney's separate wrongful act of forging plaintiff's endorsement on a settlement draft. *King v. White*, 265 Kan. 627, 962 P.2d 475 (1998).

"The test in determining the existence of agency, so that the liability for a servant's negligence will be imputed to the master, is the right to control the purported servant. Whether there is any competent evidence to prove the existence of agency is a question of law." *Major v. Castlegate, Inc.*, 23 Kan. App. 2d 694, Syl. 1, 935 P.2d 225, rev. denied 262 Kan. 962 (1997).

The determination of what constitutes agency and whether there is any competent evidence reasonably tending to prove the existence of agency is a question of law. *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 238 Kan. 384, 710 P.2d 1297 (1985); *Henderson v. Hassur*, 225 Kan. 678, 594 P.2d 650 (1979); *Highland Lumber Co., Inc. v. Knudson*, 219 Kan. 366, 2, 548 P.2d 719 (1976); *Dowling v. Southwestern Porcelain, Inc.*, 237 Kan. 536, 701 P.2d 954 (1985); *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975); *Greep v. Bruns*, 160 Kan. 48, 159 P.2d 803 (1945); *Shugar v. Antrim*, 177 Kan. 70, 276 P.2d 372 (1954); *Hendrix v. Phillips Petroleum Co.*, 203 Kan. 140, 453 P.2d 486 (1969); *Dealers Leasing, Inc. v. Allen*, 26 Kan. App. 2d 745, 994 P.2d 651 (1999).

In *Barbara Oil Co. v. Kansas Gas Supply Corp.*, 250 Kan. 438, 827 P.2d 24 (1992), the court held "[w]hat constitutes agency and whether there is competent evidence reasonably tending to prove the relationship is a question of law. Although what constitutes agency is a question of law, resolution of conflicting evidence which might establish its existence is for the finder of fact. *Aetna Casualty and Surety Co. v. Hepler State Bank*, 6 Kan. App. 2d 543, 548, 630 P.2d 721 (1981). The weight to be given evidence and resolution of conflicts therein are functions of the trier of facts in the determination of whether there is a relationship of principal and agent. Where the existence of agency is disputed, its existence or nonexistence is ordinarily a question of fact for the jury, to be determined upon proper instructions. *CIT Financial Services, Inc. v. Gott*, 5 Kan. App. 2d 224, 229-30, 615 P.2d 774, rev. denied 228 Kan. 806 (1980)." *Barbara Oil Co.*, 250 Kan. at 446-47.

Actual Agency

The law recognizes two distinct types of agencies, one actual and the other ostensible or apparent. The authority of an actual agent may be either express or implied. *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975); *Miotk v. Rudy*, 4 Kan. App. 2d 296, 605 P.2d 587, (1980); *Theis v. duPont, Glore Forgan, Inc.*, 212 Kan. 301, 306, 510 P.2d 1212 (1973); *Dealers Leasing, Inc. v. Allen*, 26 Kan. App. 2d 745, 994 P.2d 651 (1999).

It is an express agency if the principal has delegated authority to the agent by words that expressly authorize the agent to do a delegable act. It is an implied agency if it appears from the statements and conduct of the parties and other relevant circumstances that the intention was to clothe the agent with such an appearance of authority that when the agency was exercised it would normally and naturally lead others to rely on the person's acts as being authorized by the principal. An ostensible or apparent agency may exist if a principal has intentionally or by want of ordinary care induced and permitted third persons to believe a person is his or her agent even though no authority, either express or implied, has been actually conferred upon the agent. *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993); *Kansas City Heartland Const. Co. v. Maggie Jones Southport Cafe, Inc.*, 250 Kan. 32, 824 P.2d 926 (1992); *Barbara Oil Co. v. Kansas Gas Supply Corp.*, 250 Kan. 438, 827 P.2d 24 (1992); *Mohr v. State Bank of Stanley*, 241 Kan. 42, 734 P.2d 1071 (1987); *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 238 Kan. 384, 710 P.2d 1297 (1985); *Gardner v. Rensmeyer*, 221 Kan. 23, 557 P.2d 1258 (1976); *Greep v. Bruns*, 160 Kan. 48, 159 P.2d 803 (1945); *Shawnee State Bank v. North Olathe Industrial Park, Inc.*, 228 Kan. 231, 613 P.2d 1342 (1980).

"On the question of implied agency, it is the manifestation of the alleged principal and agent as between themselves that is decisive, and not the appearance to a third party or what the third party should

have known. An agency will not be inferred because a third person assumed that it existed.... ’ ” *Brown v. Wichita State University*, 217 Kan. 279, 287, 540 P.2d 66 (1975), quoting 2A C.J.S., Agency, § 52, p. 626.

“Implied agency is based on an implied intention to create an agency. It arises upon facts for which the principal is responsible. It arises when, from the statements and conduct of the parties, it appears that the principal, or the principal and the ‘agent,’ intended to make it appear to others that the acts of the ‘agent’ were authorized by the principal.” *Mohr v. State Bank of Stanley*, 241 Kan. 42, 46, 734 P.2d 1071 (1987). See also *Kansas City Heartland Const. Co. v. Maggie Jones Southport Cafe, Inc.*, 250 Kan. 32, 824 P.2d 926 (1992).

Apparent Agency

An actual agency exists by agreement, express or implied, between the principal and agent. However, apparent or ostensible agency is based on the conduct of the principal toward a third party. Apparent agency is often asserted in conjunction with a claim of equitable estoppel. See *Kansas City Heartland Const. Co. v. Maggie Jones Southport Cafe, Inc.*, 250 Kan. 32, 824 P.2d 926 (1992); *Cairo Cooperative Exchange v. First Nat’l Bank of Cunningham*, 4 Kan. App. 2d 458, 608 P.2d 1370 (1980); *Lentz Plumbing Co. v. Fee*, 235 Kan. 266, 679 P.2d 736 (1984). Apparent agency has on occasion been referred to as agency by estoppel on the theory that the principal, due to his or her conduct, should not be allowed to deny the existence of an agency relation. *Adair v. Transcontinental Oil Co.*, 184 Kan. 454, 338 P.2d 79 (1959).

“Apparent authority, or ostensible authority as it is also called, is that which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds him out as possessing. Accordingly, an apparent agent is one who, with or without authority, reasonably appears to third persons to be authorized to act as the agent of another.” *Ford v. Guarantee Abstract & Title Co.*, 220 Kan. 244, 553 P.2d 254 (1976), quoting *Greep v. Bruns*, 160 Kan. 48, 159 P.2d 803 (1945). See also *Miotk v. Rudy*, 4 Kan. App. 2d 296, 605 P.2d 587 (1980).

“Apparent [or ostensible] agency is based on intentional actions or words of the principal toward third parties which reasonably induce or permit third parties to believe that an agency relationship exists.” *Kansas City Heartland Const. Co. v. Maggie Jones Southport Cafe, Inc.*, 250 Kan. 32, 41, 824 P.2d 926 (1992). See also *Mohr v. State Bank of Stanley*, 241 Kan. 42, 734 P.2d 1071 (1987).

An ostensible or apparent agency may exist if a principal has intentionally or by want of ordinary care induced and permitted third persons to believe a person is his or her agent even though no authority, either express or implied, has been actually conferred upon the agent. *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 238 Kan. 384, 710 P.2d 1297 (1985); *Shawnee State Bank v. North Olathe Industrial Park, Inc.*, 228 Kan. 231, 613 P.2d 1342 (1980); *Gardner v. Rensmeyer*, 221 Kan. 23, 557 P.2d 1258 (1976); *Greep v. Bruns*, 160 Kan. 48, 159 P.2d 803 (1945).

Burden of Proof

Where the agency relationship is in issue the party relying thereon to establish his claim has the burden of establishing the existence of the relationship by clear and satisfactory evidence. *Highland Lumber Co., Inc. v. Knudson*, 219 Kan. 366, 548 P.2d 719 (1976); *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975); *Rodgers v. Arapahoe Pipe Line Co.*, 185 Kan. 424, 345 P.2d 702 (1959).

The burden of establishing the agency is on the party asserting it. There is no presumption that one in possession of a vehicle is the servant, employee, or agent of the owner and acting for the owner. Ownership alone is not sufficient to impute the negligence of the driver to the owner. *Felix v. U.S.D. No. 202*, 22 Kan. App. 2d 849, 923 P.2d 1056 (1996).

Other Issues

The existence of a duty is a question of law, not of fact. However, the Committee notes for reference *Schmidt v. HTG, Inc.*, 265 Kan. 372, 961 P.2d 677 (1998), which states:

“Generally, in the absence of a ‘special relationship,’ one has no duty to control the conduct of a third party to prevent harm to others. A special relationship may exist, however, with persons in charge of one with dangerous propensities or persons with custody of another.

“One who takes charge of a third person whom he or she knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him or her from doing such harm.

“A parole officer does not take charge or exercise control over a parolee so as to create a special relationship between the officer and parolee, thereby imposing a duty upon the State to control the conduct of the parolee to prevent harm to other persons or property...” Syl. ¶¶ 4-6.

K.S.A. 60-3701 provides that in any civil action no award of punitive or exemplary damages shall be assessed against “a principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer.” See also *Hartford Accident & Ins. Co. v. American Red Ball Transit Co.*, 262 Kan. 570, 938 P.2d 1281 (1997); *Flint Hills Rural Elec. Co-op Ass’n v. Federated Rural Elec. Ins. Corp.*, 262 Kan. 512, 941 P.2d 374 (1997); and *Lindsey v. Miami County National Bank*, 267 Kan. 685, 984 P.2d 719 (1999).

An agent purporting to act on his own account, but who in fact contracts on behalf of an undeclared principal, becomes a party to the contract and is personally liable thereon. *Bruce v. Smith*, 204 Kan. 473, 464 P.2d 224 (1970).

For a discussion of the liabilities of a principal and an agent to a third party in a case involving a partially disclosed principal or an undisclosed principal, see *Dimension Graphics, Inc. v. Liebowitz*, 26 Kan. App. 2d 722, 994 P.2d 658 (1999).

“A power of attorney is an instrument in writing by which one person, as principal, appoints another as agent and confers upon such agent the authority to act in the place of the principal for the purposes set forth in the instrument. *Peterson v. Peterson*, 10 Kan. App. 2d 437, 700 P.2d 585 (1985). See Kansas Uniform Durable Power of Attorney Act, K.S.A. 58-610 *et seq.* [Now Kansas Power of Attorney Act, K.S.A. 58-650 *et seq.*]” *Muller v. Bank of America, N.A.*, 28 Kan. App. 2d 136, 12 P.3d 899 (2000).

The provisions of K.S.A. 40-3403(h) abolish the vicarious liability of an employer health care provider in those circumstances that are specified in the statute. *Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991). See also *McVay v. Rich*, 18 Kan. App. 2d 746, 859 P.2d 399 (1993), *aff’d* 255 Kan. 371, 874 P.2d 641 (1994), and *Aldoroty v. HCA Health Services of Kansas, Inc.*, 265 Kan. 666, 962 P.2d 501 (1998).

For the imposter defense of K.S.A. 84-3-404(a) to be applicable, there must be an impersonation of an actual agent; misrepresentation of agency authority is generally not sufficient to invoke the defense. *King v. White*, 265 Kan. 627, 962 P.2d 475 (1998).

107.02

EXPRESS AND IMPLIED AGENCY DEFINED

A. Express Agency

An express agency exists if the principal has authorized the agent, either orally or in writing, to act for the principal.

B. Implied Agency

An implied agency exists when it appears from the statements and conduct of the parties and other relevant circumstances that the principal intended to give the agent authority to act for the principal.

Comment

See Comment to PIK 4th 107.01, Principal/Agent Relationship.

107.03

APPARENT AGENCY

An apparent agency exists when a person carelessly or intentionally causes or permits a third party to reasonably believe that _____ (name) is the person’s agent. When that occurs, the third party has a right to rely on that belief.

Notes on Use

Authority for this instruction is found in *Kansas City Heartland Const. Co. v. Maggie Jones Southport Cafe, Inc.*, 250 Kan. 32, 824 P.2d 926 (1992); *Mohr v. State Bank of Stanley*, 241 Kan. 42, 734 P.2d 1071 (1987). In appropriate cases this instruction should be used in addition to PIK 4th 107.01, Principal/Agent Relationship.

Comment

An actual agency exists by agreement, express or implied, between the principal and agent while an apparent or ostensible agency is based on the conduct of the principal toward a third party. Apparent agency is often asserted in conjunction with a claim of equitable estoppel. See *Kansas City Heartland Const. Co. v. Maggie Jones Southport Cafe, Inc.*, 250 Kan. 32, 824 P.2d 926 (1992); *Cairo Cooperative Exchange v. First Nat’l Bank of Cunningham*, 4 Kan. App. 2d 458, 608 P.2d 1370 (1980); *Lentz Plumbing Co. v. Fee*, 235 Kan. 266, 679 P.2d 736 (1984). Apparent agency has on occasion been referred to as agency by estoppel on the theory that the principal, due to his or her conduct, should not be allowed to deny the existence of an agency relation. *Adair v. Transcontinental Oil Co.*, 184 Kan. 454, 338 P.2d 79 (1959).

“[A]n apparent agent is one who, with or without authority, reasonably appears to third persons to be authorized to act as the agent of another.” *Ford v. Guarantee Abstract & Title Co.*, 220 Kan. 244, 553 P.2d 254 (1976), quoting *Greep v. Bruns*, 160 Kan. 48, 159 P.2d 803 (1945). See also *Miotk v. Rudy*, 4 Kan. App. 2d 296, 605 P.2d 587 (1980).

“Apparent [or ostensible] agency is based on intentional actions or words of the principal toward third parties which reasonably induce or permit third parties to believe that an agency relationship exists.” *Kansas City Heartland Const. Co. v. Maggie Jones Southport Cafe, Inc.*, 250 Kan. 32, 41, 824 P.2d 926 (1992); *Mohr v. State Bank of Stanley*, 241 Kan. 42, 734 P.2d 1071 (1987).

“An ostensible or apparent agency may exist if a principal has intentionally or by want of ordinary care induced and permitted third persons to believe a person is his or her agent even though no authority, either express or implied, has been actually conferred upon the agent.” *Dealers Leasing, Inc. v. Allen*, 26 Kan. App. 2d 745, 994 P.2d 651 (1999); *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 238 Kan. 384, 710 P.2d 1297 (1985); *Shawnee State Bank v. North Olathe Industrial Park, Inc.*, 228 Kan. 231, 613 P.2d 1342 (1980); *Gardner v. Rensmeyer*, 221 Kan. 23, 557 P.2d 1258 (1976); *Greep v. Bruns*, 160 Kan. 48, 159 P.2d 803 (1945).

107.04

**BOTH EMPLOYER AND EMPLOYEE SUED—NO ISSUE AS TO
EMPLOYMENT AND SCOPE**

The employer is _____ (name of employer). The employee is _____ (name of employee). If you find the employee _____ (name of employee) is liable, then you must find that the employer _____ (name of employer) is also liable. If you find _____ (name of employee) is not liable, then you must find that _____ (name of employer) is not liable.

Notes on Use

This instruction should not be given when there is an issue of fact as to employment or when there is a basis for the employer's liability independent of the employee's liability. Use the words "principal" and "agent" instead of "employer" and "employee" in the appropriate case.

If either the existence of the employment, or the scope of the employment at the particular time, is in dispute as an issue of fact and both the employer and the employee are defendant parties, then PIK 4th 107.08, Employer Sued, But Not Employee—Employment or Scope Denied—Employer Sued Under Respondeat Superior Only, should be used; but if the employer is the sole defendant, then PIK 4th 107.05, Employer Sued But Not Employee—No Issue as to Employment and Scope, should be used.

Comment

"A master or principal is responsible for the tortious acts of his servant or agent where such acts are incidental to and done in furtherance of the business of the master or principal, even if such acts are done willfully or in excess of the authority conferred." *Kiser v. Skelly Oil Co.*, 136 Kan. 812, 816, 18 P.2d 181 (1933).

An employer is liable for the tortious acts of his or her employee only under special circumstances. Special circumstances exist when the employee is on the employer's premises, performing work for the employer, or using the employer's chattel, or when the employer voluntarily assumes a duty to control the employee, or when the employer negligently retains a known incompetent or unfit employee. *Thies v. Cooper*, 243 Kan. 149, 156, 753 P.2d 1280 (1988). See also *Calwell v. Hassan*, 21 Kan. App. 2d 729, 908 P.2d 184 (1995); *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993).

If an agent is sued alone, he or she may be held liable. "An agent cannot escape liability to third persons by pleading he acted at the command or on account of the principal. This is for the reason that the tort liability of the agent is not based on the contractual relationship between the principal and agent, but on the common-law obligation that every person must so act or use that which he controls as not to injure another. (Am. Jur., Agency § 326; Restatement of the Law, Agency, 343, p. 753.) The contention that the defendant would be liable only if acting outside the scope of his employment and authority is not correct. He is liable to third parties in either event." *Russell v. American Rock Crusher Co.*, 181 Kan. 891, 895, 317 P.2d 847 (1957).

The provisions of K.S.A. 40-3403(h) abolish the vicarious liability of an employer health care provider in those circumstances that are specified in the statute. *Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991). See also *McVay v. Rich*, 18 Kan. App. 2d 746, 859 P.2d 399 (1993), *aff'd* 255 Kan. 371, 874 P.2d 641 (1994), and *Aldoroty v. HCA Health Services of Kansas, Inc.*, 265 Kan. 666, 962 P.2d 501 (1998).

107.05**EMPLOYER SUED BUT NOT EMPLOYEE—NO ISSUE AS TO
EMPLOYMENT AND SCOPE**

_____ (*name of employer*) is responsible for any negligent act or omission of _____ (*name of employee*).

If you find _____ (*name of employee*) was negligent, then you must find that the defendant _____ (*name of employer*) was negligent. But if you find _____ (*name of employee*) was not negligent, then you must find that the defendant _____ (*name of employer*) was not negligent.

Notes on Use

This instruction should not be given when there is an issue of fact as to the existence of an employment relationship or scope of employment. Use the words “principal” and “agent” instead of “employer” and “employee” in the appropriate case.

Comment

See Comment to PIK 4th 107.04, Both Employer and Employee Sued—No Issue as to Employment and Scope.

107.06

SCOPE OF AUTHORITY**A. Agent**

An agent's authority is limited to acts specifically authorized by the principal and the agent's acts which are incidental to or reasonably necessary for the performance of an authorized act.

B. Employee

The scope of employment is the complete range of activities an employee is authorized to perform and those an employee might reasonably be expected to perform while carrying out the business of the employer.

Notes on Use

If both the principal and agent are parties defendant and the scope of the agency is in dispute, PIK 4th 107.07, Both Employer and Employee Sued—Employment and Scope Denied—Employer Sued Under Respondeat Superior Only, should accompany PIK 4th 107.06. If the principal is the sole defendant and he or she disputes the scope of the agency relation, PIK 4th 107.08, Employer Sued, but Not Employee—Employment or Scope Denied—Employer Sued Under Respondeat Superior Only, should accompany PIK 4th 107.06. See PIK 4th 107.09 for instruction on ratification of agent's unauthorized acts.

Comment

While a secretary of a corporation ordinarily has no authority by virtue of his office to bind the corporation, the corporation may be bound by his acts when it entrusts him with the management of its business, and where his acts are in furtherance of the corporate business. *Shunga Plaza, Inc. v. American Employers' Ins. Co.*, 204 Kan. 790, 796, 465 P.2d 987 (1970).

PIK 2d 7.04 [PIK 4th 107.06] was cited with approval in *Williams v. Community Drive-In Theater, Inc.*, 214 Kan. 359, 520 P.2d 1296 (1974). An employee is acting within the scope of his authority when he is performing services for which he has been employed, or when he is doing anything that is reasonably incidental to his employment. The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the employer, but whether such conduct should have been fairly foreseen from the nature of the employment and the duties relating to it. See also *Commerce Bank of St. Joseph v. State*, 251 Kan. 207, 833 P.2d 996 (1992).

Liability of employer for acts of his employee depends not upon whether the injurious act of employee was willful and intentional or was unintentional, but upon whether employee, when he did the wrong, was acting in prosecution of employer's business and within scope of his authority or had stepped

aside from that business and had done an individual wrong. *Hollinger v. Stormont Hosp. & Training School for Nurses*, 2 Kan. App. 2d 302, 578 P.2d 1121 (1978).

In some circumstances, an employee may be acting within the scope of his employment while traveling to and from the workplace. *Mulroy v. Olberding*, 29 Kan. App. 2d 757, 30 P.3d 1050 (2001), *rev. denied* 273 Kan. 1036 (2002).

K.S.A. 60-3701 provides that in any civil action where a claim for punitive or exemplary damages is included no award of punitive or exemplary damages shall be assessed against “a principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer.” See also *Hartford Accident & Ins. Co. v. American Red Ball Transit Co.*, 262 Kan. 570, 938 P.2d 1281 (1997), and *Flint Hills Rural Elec. Co-op Ass’n v. Federated Rural Elec. Ins. Corp.*, 262 Kan. 512, 941 P.2d 374 (1997).

A state employee’s acceptance of a bribe was determined not to be within the employee’s scope of employment. *Commerce Bank of St. Joseph v. State*, 251 Kan. 207, 833 P.2d 996 (1992).

In *O’Shea v. Welch*, 350 F.3d 1101 (10th Cir. 2003), the 10th Circuit Court of Appeals relied upon PIK 3d 107.06 [now PIK 4th 107.06] in predicting that Kansas courts would hold that a mere deviation by an employee from the strict course of his employment duty does not release his employer from liability for the employee’s actions if the employee’s main purpose is still to carry on the business of the employer. Noting that its only guidance to Kansas law was from the jury instruction, the court determined that, while a substantial deviation by an employee from his employer’s business would absolve the employer from liability during that lapse, a slight or incidental deviation by the employee would not. Several factors may be considered in determining whether the deviation is substantial or slight including:

- 1) the employee’s intent;
- 2) the nature, time and place of the deviation;
- 3) the time consumed in the deviation;
- 4) the work for which the employee was hired;
- 5) the incidental acts reasonably expected by the employer; and
- 6) the freedom allowed the employee in performing his job responsibilities.

107.07

**BOTH EMPLOYER AND EMPLOYEE SUED—EMPLOYMENT
AND SCOPE DENIED—EMPLOYER SUED UNDER
RESPONDEAT SUPERIOR ONLY**

The defendant _____ (*employer's name*) has been sued as the employer and the defendant _____ (*alleged employee's name*) has been sued as (*his*) (*her*) employee. (*It has been denied that any employment relation existed*). It is (*also*) denied that _____ (*alleged employee's name*) was acting within the scope of (*his*) (*her*) authority as an employee of the defendant _____ (*employer's name*) at the time of the injury involved in this case.

If you find that the defendant _____ (*alleged employee's name*) was the employee of the defendant _____ (*employer's name*) (*and was acting within the scope of [his] [her] authority*) at the time of the occurrence, and if you find _____ (*alleged employee's name*) is liable, then both are liable. If you find that _____ (*alleged employee's name*) is not liable, then neither defendant is liable.

If you find that the defendant _____ (*alleged employee's name*) is liable but was not acting as an employee of the defendant _____ (*employer's name*) (or within the scope of [*his*] [*her*] authority as an employee of the defendant _____ (*employer's name*)) at the time of the (*occurrence*) (*injury*) involved in this case, then the defendant _____ (*employer's name*) is not liable.

Comment

See Comment to PIK 4th 107.01, Principal/Agent Relationship, and PIK 4th 107.06, Scope of Authority.

There is no question better settled than that the acts of an agent within the scope or apparent scope of his authority are binding upon his principal. *Cross v. Aubel*, 154 Kan. 507, 119 P.2d 490 (1941). Authorities concerning the tort liability of a corporation for acts of its agent are set out in *Russell v. American Rock Crusher Co.*, 181 Kan. 891, 317 P.2d 847 (1957). See also *Kerns v. G.A.C., Inc.*, 255 Kan. 264, 875 P.2d 949 (1994).

107.08

**EMPLOYER SUED, BUT NOT EMPLOYEE—EMPLOYMENT OR
SCOPE DENIED—EMPLOYER SUED UNDER
RESPONDEAT SUPERIOR ONLY**

The plaintiff claims that _____ (*name of employee*) was the employee of the defendant _____ (*name of employer*), at the time of the occurrence involved in this case and that _____ (*name of employee*) was then acting within the scope of [(his) (her)] [(employment) (authority)]. The defendant _____ (*name of employer*) [denies that _____ (*name of employee*) was (his) (her) employee] [denies that _____ (*name of employee*) was acting within the scope of [(his) (her)] [(authority) (employment)]] at that time.

If at the time of this occurrence _____ (*name of employee*) was the employee of defendant, and was acting within the scope of [(his) (her)] [(authority) (employment)], then the (*negligence*) (*conduct*) of _____ (*name of employee*) is the (*negligence*) (*conduct*) of the defendant and defendant _____ (*name of employer*) is responsible for the (*negligence*) (*conduct*) of _____ (*name of employee*).

If at the time of this occurrence _____ (*name of employee*) (*was not the employee of defendant*) (*was not acting within the scope of [(his) (her)] [(authority) (employment)]*), then the (*negligence*) (*conduct*) of _____ (*name of employee*) is not the (*negligence*) (*conduct*) of the defendant _____ (*name of employer*).

Comment

There is no question better settled than that the acts of an agent within the scope or apparent scope of his authority are binding upon his principal. *Cross v. Aubel*, 154 Kan. 507, 119 P.2d 490 (1941). Authorities concerning the tort liability of a corporation for acts of its agent are set out in *Russell v. American Rock Crusher Co.*, 181 Kan. 891, 317 P.2d 847 (1957). See also *Kerns v. G.A.C., Inc.*, 255 Kan. 264, 875 P.2d 949 (1994).

In *Traylor v. Wachter*, the question of whether or not an agency relationship existed was held to be one for the jury. The appellate court held its function only extended to determining as a matter of law if the record contained evidence on which a finding of agency could be based. *Traylor v. Wachter*, 3 Kan. App. 2d 536, 543, 598 P.2d 1061 (1979), *aff'd in part, rev'd in part* 227 Kan. 221, 607 P.2d 1094 (1980).

The burden of establishing the agency is on the party asserting it. There is no presumption that one in possession of a vehicle is the servant, employee, or agent of the owner and acting for the owner. Ownership alone is not sufficient to impute the negligence of the driver to the owner. *Felix v. U.S.D. No. 202*, 22 Kan. App. 2d 849, 923 P.2d 1056 (1996).

The provisions of K.S.A. 40-3403(h) abolish the vicarious liability of an employer health care provider in those circumstances that are specified in the statute. *Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991). See also *McVay v. Rich*, 18 Kan. App. 2d 746, 859 P.2d 399 (1993), *aff'd* 255 Kan. 371, 874 P.2d 641 (1994), and *Aldoroty v. HCA Health Services of Kansas, Inc.*, 265 Kan. 666, 962 P.2d 501 (1998).

A state employee's acceptance of a bribe was determined not to be within the employee's scope of employment. *Commerce Bank of St. Joseph v. State*, 251 Kan. 207, 833 P.2d 996 (1992).

107.09

RATIFICATION OF AGENT'S UNAUTHORIZED ACT

Ratification is the adoption or confirmation by a principal of an act performed on *(his) (her)* behalf by an agent which act was performed by the agent without authority from the principal. Ratification may be either express or implied. Ratification may be accomplished before, during, or after the agent's unauthorized act.

[Unless the principal, upon acquiring knowledge of the unauthorized act of *(his) (her)* agent, promptly repudiates the act, it is presumed the principal ratifies and affirms the act.]

[Ratification may be implied from a course of conduct by the principal indicating the approval, sanctioning, or confirmation of the agent's unauthorized act.]

Notes on Use

Authority for this instruction is found in *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993), and *Theis v. duPont, Glore Forgan Inc.*, 212 Kan. 301, 510 P.2d 1212 (1973). See Comment to PIK 4th 107.01, Principal/Agent Relationship.

The first optional paragraph should be given in cases where there is evidence that the principal had knowledge of the agent's unauthorized act. In those cases where ratification may be implied from the course of conduct of the principal, the court may also add the second optional paragraph. The second optional paragraph may be given in addition to the first optional paragraph or in lieu thereof, depending on the circumstances of the case. See *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993), and *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975).

Comment

K.S.A. 60-3701 provides that in any civil action where a claim for punitive or exemplary damages is included, no award of punitive or exemplary damages shall be assessed against "a principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer." For a discussion of the ratification concept as used in this statute see *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993).

In the context of agency law ratification is defined as "the adoption or confirmation by a principal of an act performed on his behalf by an agent, which act was performed without authority." *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993); *Schraft v. Leis*, 236 Kan. 28, 686 P.2d 865 (1984). See also *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975).

Generally, a principal's ratification of an unauthorized act is ratification of the whole act. However, where a plaintiff ratified his attorney's unauthorized settlement of a claim, the ratification did not extend to the attorney's separate wrongful act of forging plaintiff's endorsement on a settlement draft. *King v. White*, 265 Kan. 627, 962 P.2d 475 (1998).

In *Foley Co. v. Scottsdale Ins. Co.*, 28 Kan. App. 2d 219, 15 P.3d 353 (2000), the court held that "[u]nder agency law, once a principal knows of an agent's unauthorized actions, it cannot sit back and see if

it will benefit or suffer from the agent's actions. Instead, a principal who receives notice of an unauthorized act of an agent must promptly repudiate the agent's actions or it is presumed that the principal ratified the act. Ratification is the adoption or confirmation by a principal of an unauthorized act performed on its behalf by an agent. *Theis v. duPont, Glore Forgan Inc.*, 212 Kan. 301, 510 P.2d 1212 (1973)."

Whether there has been a repudiation within a reasonable time is a question of fact. The ratification of an unauthorized act is not the ratification of another entirely separate and distinct act. See *Theis v. duPont, Glore Forgan Inc.*, 212 Kan. 301, 510 P.2d 1212 (1973).

In *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975), the court held "Knowledge of the unauthorized act is essential for the principal to ratify the act, and must be shown or facts proved that its existence is a necessary inference therefrom." In a later case, the court held that an employer may ratify an employee's misconduct where the acts occurred with such frequency that the employer knew "or should have known" of the questionable conduct. *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993).

In cases predating *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993), it was held that the doctrine of ratification "is confirmation after conduct, amounting to a substitute for prior authority." *Adrian v. Elmer*, 178 Kan. 242, 284 P.2d 599 (1955). In *Smith*, the court held that evidence of corporate policies, procedures or managerial behavior could lead to a jury finding that the questioned conduct of the employee was authorized or ratified. In such instances, ratification precedes the questioned conduct.

107.20

PARTNERSHIP—PARTNERS—DEFINITION

You must decide whether or not _____ (name) and _____ (name) were partners. Persons are considered to be partners when they join together to carry on as co-owners a business for profit, whether or not the persons actually intended to form a partnership.

Factors you may consider in deciding whether persons are partners include _____.

Notes on Use

For authority, see K.S.A. 56a-101, K.S.A. 56a-202, *George v. Capital South Mtg. Investments, Inc.*, 265 Kan. 431, 961 P.2d 32 (1998), and *Potts v. Lux*, 161 Kan. 217, 166 P.2d 694 (1946).

This instruction should be used only when the existence of a partnership is in issue.

In the second paragraph the court should list those factors tending to prove the existence of a partnership.

K.S.A. 56a-202(c) sets forth the following rules to be considered:

- (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.
- (2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.
- (3) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:
 - (i) Of a debt by installments or otherwise;
 - (ii) or services as an independent contractor or of wages or other compensation to an employee;
 - (iii) of rent;
 - (iv) of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;
 - (v) of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or
 - (vi) for the sale of the goodwill of a business or other property by installments or otherwise.

In *George*, decided in 1998, the court approved the following list of factors set forth in the 1946 *Potts* decision:

“Numbered among the often approved tests to which we have referred are the following: Intention of parties to the contract; sharing in profits and losses; charging of losses against accumulated profits; community of control over management and direction of

the business; active participation in management of the affairs of the enterprise; joint control and exercise of ownership over all or part of the business assets; participation in division of the net earnings; sharing in payment of expenses of operation; fixing of salaries by joint agreement; investment in the business of undistributed profits for the purpose of building up a substantial cash reserve; division of undistributed profits in the event of liquidation contingent upon repayment to one of the parties of cash originally invested in capital.”

Comment

The 1998 Kansas Legislature replaced the Uniform Partnership Act of 1972 with a revised Uniform Partnership Act that became effective January 1, 1999. (K.S.A. 56a-101 *et seq.*)

Kansas courts have recognized the difficulty in defining a partnership and determining whether a partnership exists. *Wade v. Hornaday*, 92 Kan. 293, 140 P. 870 (1914); *Potts v. Lux*, 161 Kan. 217, 166 P.2d 694 (1946). PIK 4th 107.20 incorporates the statutory definition of a partnership. (K.S.A. 56a-101, K.S.A. 56a-202). The revised Uniform Partnership Act added to the definition of partnership the phrase “whether or not the persons intend to form a partnership.” This additional language merely codifies prevailing case law that “a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be ‘partners’.” UPA § 202 cmt. 1.

A partnership is an entity distinct from its partners. (K.S.A. 56a-201). A partnership may sue or be sued in the name of the partnership, but a judgment against the partnership is not a judgment against a partner. A judgment against the partnership may not be satisfied from the personal assets of a partner unless the partner is also personally liable for the claim and the claim cannot be satisfied from the partnership assets or for other statutory reasons set forth in K.S.A. 56a-307.

A partnership formed under the revised Kansas Uniform Partnership Act, K.S.A. 56a-101 *et seq.* may be converted to a limited liability partnership. K.S.A. 56a-1001.

“Whether a partnership exists between particular persons is a mixed question of law and fact. If there is no dispute as to the facts the question is one of law for the court to determine. If the agreement under which a business arrangement is carried on, and which is claimed to be a partnership, is in writing, and free from ambiguity or doubt, its legal effect must be determined as a matter of law. If an attempt to establish a partnership wholly fails through lack of evidence, the court may properly decide as a matter of law that no partnership exists. The existence of a partnership is also a question of fact, and it is the province of the court in absence of a jury to decide whether those facts exist which show that a partnership has been formed. (*Stalker v. DeWitt*, 142 Kan. 709, 51 P.2d 1012 [1935].)” *Beverly v. McCullick*, 211 Kan. 87, 96-97, 505 P.2d 624 (1973).

Whether a partnership exists between particular individuals depends on the intention of the parties, the terms of their agreement, and the manner in which their business affairs are carried out. *Grimm v. Pallesen*, 215 Kan. 660, 527 P.2d 978 (1974).

A person may estop himself from denying his liability as a partner, where such relationship does not exist in fact, by holding himself out as such, or where his course of conduct and representations leads another to believe he is a partner, and the party misled extends credit in reliance thereon. *Muse v. Baker*, 216 Kan. 788, 533 P.2d 1234 (1975).

The Uniform Partnership Act recognizes the principle of *delectus personae* by distinguishing a partner’s interest in the partnership and a partner’s right to participate in management. A partner’s interest in the partnership is his or her share of the profits and surplus. In a limited partnership, the partner’s interest is a share of the profits and losses and the right to receive distributions of partnership assets. *Temple v. White Lakes Plaza Assoc., Ltd.*, 15 Kan. App. 2d 771, 816 P.2d 399 (1991).

Sharing of profits and losses is not always a conclusive test. For sharing in other relationships, see *Moore v. Thompson*, 105 Kan. 492, 184 P. 980 (1919) (principal and agent); *Curtis v. Hanna*, 143 Kan. 186, 53 P.2d 795 (1936) (employer and employee); and *Weiland v. Sell*, 83 Kan. 229, 190 P. 771 (1910) (commissions on one class of sales).

In making a division of property of parties who are cohabiting but are not legally married, the trial court is not bound by the Uniform Partnership Act, K.S.A. 56-301 *et seq.*, or required to apply principles of partnership law. *In re Marriage of Thomas*, 16 Kan. App. 2d 518, 825 P.2d 1163 (1992).

A joint venture is so similar in its nature and in the contractual relations created thereby that the rights and duties of the parties are governed practically by the same rules that govern partnerships. *Stricklin v. Parsons Stockyard Co.*, 192 Kan. 360, 388 P.2d 824 (1964).

The similarities and differences in partnership and joint venture are discussed Jaeger, *Joint Ventures: Recent Developments*, 4 Washburn L.J. 9 (1964). For the definition of a joint enterprise in motor vehicle cases see PIK 4th 121.97.

107.21

PARTNERSHIP—EXISTENCE OF RELATIONSHIP AND SCOPE OF AUTHORITY IN ISSUE—CONSEQUENCE OF RELATIONSHIP

An act or omission of one partner in furtherance of a partnership business is, in law, the responsibility of all of the partners (*even though they did not know of the act or omission*).

If you find that _____ (*first partner's name*) and _____ (*second partner's name*) were partners and that _____ (*first partner's name*) act or omission in _____ (*insert action or inaction of partner*) was in furtherance of the partnership business, then _____ (*second partner's name*) is responsible for _____ (*first partner's name*) act or omission.

Notes on Use

For authority, see K.S.A. 56a-301.

This instruction should be used only when the existence of a partnership and the question of the scope of the partner's authority are in issue.

Comment

The 1998 Kansas Legislature replaced the Uniform Partnership Act of 1972 with a revised Uniform Partnership Act that became effective January 1, 1999. (K.S.A. 56a-101 *et seq.*)

Kansas courts have recognized the difficulty in defining a partnership and determining whether a partnership exists. *Wade v. Hornaday*, 92 Kan. 293, 140 P. 870 (1914), *Potts v. Lux*, 161 Kan. 217, 166 P.2d 694 (1946). PIK 4th 107.20 incorporates the statutory definition of a partnership. (K.S.A. 56a-101, K.S.A. 56a-202)

A partnership is an entity distinct from its partners. (K.S.A. 56a-201.) A partnership may sue or be sued in the name of the partnership, but a judgment against the partnership is not a judgment against a partner. A judgment against the partnership may not be satisfied from the personal assets of a partner unless the partner is also personally liable for the claim and the claim cannot be satisfied from the partnership assets or for other statutory reasons set forth in K.S.A. 56a-307.

Each partner is the general agent of the partnership in all matters within the apparent scope of the partnership. The knowledge of one concerning partnership matters is constructively the knowledge of all, although the other members are actually ignorant thereof. *Barber v. Van Horn*, 54 Kan. 33, 36 P. 1070 (1894). See also K.S.A. 56a-301.

Each partner is liable for the full amount of the debts of the partnership. *Lawson v. Lawrence Oil & Gas Co.*, 135 Kan. 740, 12 P.2d 711 (1932). Each partner is jointly and severally liable for debts resulting from partnership business. *Gillespie v. Seymour*, 19 Kan. App. 2d 754, 876 P.2d 193 (1994). See also K.S.A. 56a-306.

107.22

PARTNERSHIP—SCOPE OF AUTHORITY—DEFINITION

You must decide whether or not the defendant _____ (*name of partner*) was acting within the scope of (*his*) (*her*) authority.

A partner is acting within the scope of (*his*) (*her*) partnership authority when performing services for the partnership or when doing anything reasonably incidental to the partnership business. The test is not necessarily whether specific conduct was expressly authorized or forbidden by a partner or partners, but whether such conduct should have been fairly foreseen by a partner or partners from the nature of the rights and duties of a partner.

Notes on Use

For authority, see K.S.A. 56a-301.

Comment

A partner's authority to bind the partnership is limited to transactions within the scope of the partnership business, or within the apparent scope of the partner's authority. *Executive Financial Services, Inc., v. Loyd*, 238 Kan. 663, 715 P.2d 376 (1986). See also *Phillips v. Carson*, 240 Kan. 462, 731 P.2d 820 (1987).

107.23

**PARTNERSHIP—EXISTENCE OF RELATIONSHIP
ADMITTED—SCOPE OF AUTHORITY IN ISSUE—
CONSEQUENCE OF RELATIONSHIP**

You are instructed that _____ (*first partner's name*) and _____ (*second partner's name*) are partners. If you find that _____ (*first partner's name*) was acting within the scope of (*his*) (*her*) partnership authority at the time of the occurrence, then the (*negligence*) (*conduct*) of _____ (*first partner's name*) is the (*negligence*) (*conduct*) of _____ (*second partner's name*). On the other hand, if you find that _____ (*first partner's name*) was not acting within the scope of (*his*) (*her*) partnership authority, the (*negligence*) (*conduct*) of _____ (*first partner's name*) is not the (*negligence*) (*conduct*) of _____ (*second partner's name*).

Notes on Use

For authority, see K.S.A. 56a-305 and 56a-306.

This instruction should be used only when the existence of a partnership is admitted and the scope of the partner's authority is in issue. If ratification of partner's act is an issue, see PIK 4th 107.21, Partnership—Existence of Relationship and Scope of Authority in Issue—Consequence of Relationship.

Comment

Each partner is the general agent of the partnership in all matters within the apparent scope of the partnership. The knowledge of one concerning partnership matters is constructively the knowledge of all, although the other members are actually ignorant thereof. *Barber v. Van Horn*, 54 Kan. 33, 36 P. 1070 (1894).

107.26

JOINT VENTURE—DEFINITION

A joint venture is an association of two or more persons or corporations to carry out a single business enterprise for profit. A joint venture can exist only by the agreement of the parties, and such an agreement may be found in the mutual acts and conduct of the parties. In deciding whether _____ (name) and _____ (name) were engaged in a joint venture, you may consider any of the following shown by the evidence:

- 1. the joint ownership and control of property;**
- 2. the sharing of expenses, profits and losses, and having and exercising some voice in determining the division of the net earnings;**
- 3. a community of control over and active participation in the management and direction of the business enterprise;**
- 4. the intention of the parties, express or implied; and**
- 5. the fixing of salaries by joint agreement.**

No single one of these acts is controlling in the determination of whether a joint venture exists.

Notes on Use

For authority, see *George v. Capital South Mtg. Investments, Inc.*, 265 Kan. 431, 961 P.2d 32 (1998).

Comment

“The rights and liabilities of joint venturers are governed practically by the same rules that govern partners. Each member of a joint venture acts as both principal and agent of his coventurers as to those things done within the apparent scope of the venture and for its benefit.” *Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.*, 226 Kan. 70, Syl. ¶¶ 3-4, 596 P.2d 816 (1979); *Neighbors Const. Co., Inc. v. Seal-Wells Const. Co., Inc.*, 219 Kan. 382, 385, 548 P.2d 491 (1976).

A joint venture is so similar to a partnership in its nature and in the contractual relations of the parties, that rights and liabilities of the adventurers are governed practically by the same rules that govern partnerships. *Goben v. Barry*, 234 Kan. 721, 676 P.2d 90 (1984); *Stricklin v. Parsons Stockyard Co.*, 192 Kan. 360, 363, 388 P.2d 824 (1964).

“The intent to form such a relationship must exist; a joint venture cannot arise by operation of law. However, as to third persons, the legal, and not the actual, intent of the parties controls, and the parties may be estopped in favor of third persons from denying that they are joint venturers, even though they never intended to become such.” *George v. Capital South Mtg. Investments, Inc.*, 265 Kan. 431, 961 P.2d 32 (1998).

107.30

INDEPENDENT CONTRACTOR—DEFINITION

An independent contractor is one who agrees to perform work for another party when the other party only directs the outcome or result to be achieved. The other party has no right to direct or control the manner in which the work is performed.

Comment

Independent contractor is defined in *Snyder v. Lamb*, 191 Kan. 446, 381 P.2d 508 (1963). It is also noted that the right-of-control test is not an exclusive test. Other relevant facts are to be considered. See *Bush v. Wilson & Co.*, 157 Kan. 82, 138 P.2d 457 (1943).

An independent contractor is defined as one who, in exercising an independent employment, contracts to do certain work according to his or her own methods, without being subject to the control of the employer, except as to the results or product of his or her work. The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. *Mitzner v. State Dept. of SRS*, 257 Kan. 258, 891 P.2d 435 (1995).

Where facts are undisputed or evidence is susceptible of only a single conclusion, it is a question of law for courts whether an individual has the status of an employee or independent contractor. *Mitzner v. State Dept. of SRS*, 257 Kan. 258, 891 P.2d 435 (1995).

For facts to be considered in distinguishing employees from independent contractors, see *Bush v. Wilson & Co.*, 157 Kan. 82, 138 P.2d 457 (1943); *Sims v. Dietrich*, 155 Kan. 310, 124 P.2d 507 (1942); *Read v. Warkentin*, 185 Kan. 286, 341 P.2d 980 (1959); *Phillips Pipe Line Co. v. Kansas Cold Storage, Inc.*, 192 Kan. 480, 389 P.2d 766 (1964); *Home Design, Inc. v. Kansas Dept. of Human Resources*, 27 Kan. App. 2d 242, 2 P.3d 789 (2000).

For the definition of independent contractor, see *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991); *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994); *McDonnell v. The Music Stand, Inc.*, 20 Kan. App. 2d 287, 886 P.2d 895 (1994).

PIK 2d 7.01 and 7.11 [PIK 4th 107.01 and 107.30] are recognized as being derived from and consistent with Kansas law in *Griffith v. Mount Carmel Medical Ctr.*, 809 F. Supp. 839, 841 (D. Kan. 1992).

107.31

AGENT OR INDEPENDENT CONTRACTOR—EFFECT

You are to determine whether, at the time of the (*mishap*) (*collision*) (*occurrence*) involved in this case, _____ (*name of employee*) was an employee of _____ (*name of employer*) or whether _____ (*name of employee*) was an independent contractor. If you find that _____ (*name of employee*) was an employee, then _____ (*name of employer*) is responsible for the (*negligence*) (*conduct*) of _____ (*name of employee*). But if you find that _____ (*name of employee*) was an independent contractor, then _____ (*name of employer*) is not responsible for the (*negligence*) (*conduct*) of _____ (*name of employee*).

Comment

For authority as to the liability of an employer for the negligence of his or her employee, see Comment to PIK 4th 107.04, Both Principal and Agent Sued—No Issue as to Agency.

An exception to the general rule of nonliability of an employer for the negligence of an independent contractor is the inherently dangerous activity doctrine. That doctrine provides that one who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which the employer contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to others by the contractor's failure to take reasonable precautions against such dangers. *Wilson v. Daytec Constr. Co.*, 22 Kan. App. 2d 401, 916 P.2d 72 (1996); *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994); *Reilly v. Highman*, 185 Kan. 537, 345 P.2d 652 (1959); *Phillips Pipe Line Co. v. Kansas Cold Storage, Inc.*, 192 Kan. 480, 389 P.2d 766 (1964).

Whether an activity is inherently or intrinsically dangerous is a question of law to be decided by the court when the facts are undisputed. When the facts are in dispute the question is to be determined by the jury. *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991). See also *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

107.40

CORPORATION—LIABILITY FOR CONDUCT OF EMPLOYEES

_____ (*Name of party*) is a corporation and can act only through its officers and employees. The (*negligence*) (*conduct*) of an officer or employee acting within the scope of [(*his*) (*her*)] [(*employment*) (*authority*)] is the (*negligence*) (*conduct*) of the corporation.

Notes on Use

PIK 4th 107.06, Scope of Authority, or PIK 4th 107.22, Partnership—Scope of Authority—Definition, may be altered to fit the particular facts of a case to define scope of employment.

Comment

The rule that the master is civilly liable for the tortious acts of his servant applies to corporations as well as to individuals. *Mercer v. Fred Harvey*, 116 Kan. 365, 226 P. 761 (1924).

A corporation is liable not only for its own torts but also for the torts of its agents when committed within the scope of the agents' authority and course of employment. Officers, agents, and employees of a corporation who violate a duty owed to third persons are liable to such persons for their torts. *Kerns v. G.A.C., Inc.*, 255 Kan. 264, 875 P.2d 949 (1994).

A corporation is liable for the torts of its agent when committed within the scope of the agent's authority and course of employment even though it did not authorize or ratify the tortious acts. *Kline v. Multi-Media Cablevision, Inc.*, 233 Kan. 988, 66 P.2d 711 (1983).

A corporation is liable for the torts of its agents committed within the scope of the agents' authority and course of employment, even though it did not authorize or ratify the tortious acts and even though it forbade them. *Russell v. American Rock Crusher Co.*, 181 Kan. 891, 317 P.2d 847 (1957).

K.S.A. 60-3701 provides that in any civil action where a claim for punitive or exemplary damages is included, no award of punitive or exemplary damages shall be assessed against "a principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer." See also *Hartford Accident & Ins. Co. v. American Red Ball Transit Co.*, 262 Kan. 570, 938 P.2d 1281 (1997); *Flint Hills Rural Elec. Co-op Ass'n v. Federated Rural Elec. Ins. Corp.*, 262 Kan. 512, 941 P.2d 374 (1997); and *Lindsey v. Miami County National Bank*, 267 Kan. 685, 984 P.2d 719 (1999).

The liability of the principal for acts and contracts of his agent is discussed in *Ford v. Guarantee Abstract & Title Co.*, 220 Kan. 244, 553 P.2d 254 (1976).

107.50**EMPLOYER—EMPLOYEE RELATIONSHIP DEFINED**

There is an employer-employee relationship when the employer has the right to direct and control the work performed by the employee. It is the existence of the employer's right to control, not the exercise of control, that creates the employer-employee relationship.

Notes on Use

Where there is an issue as to whether the relationship is one of employer-employee or independent contractor, this instruction should be given with PIK 4th 107.30, Independent Contractor—Definition.

Comment

For authorities distinguishing employees from independent contractors, see PIK 4th 107.30, Comment.

107.51

EMPLOYER'S DUTY TO EMPLOYEE

An employer has a duty not to expose the employee in the discharge of *(his) (her)* employment to dangers against which the employer can guard by the exercise of reasonable care. *(He) (She)* has a duty to warn the employee of hazardous conditions that *(he) (she)* cannot guard against by the exercise of reasonable care. It is also the employer's duty to provide safe and suitable machinery, tools, and implements to work with and a safe place to work. This includes the duty to exercise reasonable care in furnishing such appliances, and in keeping them in repair and in making inspections and tests.

An employee may enter upon the discharge of *(his) (her)* labor, assuming that these duties have been discharged by the employer.

Comment

For authority, see *Concannon, Administrator v. Taylor*, 190 Kan. 687, 690, 378 P.2d 82 (1963), where the rules are stated in an action involving a servant killed in an explosion and fire resulting from operating farm equipment using liquefied petroleum gas. See also *Blackmore v. Auer*, 187 Kan. 434, 357 P.2d 765 (1960), involving a farm laborer. In *Fishburn v. International Harvester Co.*, 157 Kan. 43, 138 P.2d 471 (1943), it was held the fact that such tools are "simple tools" does not bar a recovery on theory of negligence of master in failing to provide safe tools where master knowingly furnished such defective tools.

The common-law defense of assumption of risk has not been altered by the adoption of comparative fault, K.S.A. 60-258a, and continues to constitute an absolute bar to recovery in those cases where the defense is applicable. *Jackson v. City of Kansas City*, 235 Kan. 278, 680 P.2d 877 (1984); *Tuley v. Kansas City Power & Light Co.*, 252 Kan. 205, 843 P.2d 248 (1992). In *Tuley*, an employee suffering damage to his automobile due to the negligent acts of the employer was held to have assumed the risk where the employee voluntarily exposed his property to a known danger. Though the employer's negligence consisted of a violation of a statute, the employee assumed the risk.

An employer has a duty to provide a safe working environment, including the structure and its surroundings. *Chadwell v. Clements*, 18 Kan. App. 2d 84, 847 P.2d 1344 (1993).

107.52**ASSUMPTION OF RISK****Comment**

This instruction has been deleted. The Kansas Supreme Court in *Simmons v. Porter*, 298 Kan. 299, 312 P.3d 345 (2013) held as follows:

Syllabus ¶ 5. “Since the enactment of comparative fault, K.S.A. 60-258a(a) has provided that contributory negligence will not prevent a plaintiff from recovering damages if that plaintiff’s negligence was less than the causal negligence of the other parties to the occurrence. Instead, the plaintiff’s damages will be diminished in proportion to the amount of negligence attributed to the plaintiff.”

Syllabus ¶ 6. “The rationale for retaining the assumption of risk doctrine is no longer viable in Kansas given statutory comparative fault rules and subsequent caselaw. Prior caselaw applying the assumption of risk doctrine to bar recovery is overruled.”

107.53

**ASSUMPTION OF RISK—ORDERING INTO
DANGEROUS SITUATION****Comment**

This instruction has been deleted. The Kansas Supreme Court in *Simmons v. Porter*, 298 Kan. 299, 312 P.3d 345 (2013) held as follows:

Syllabus ¶ 5. “Since the enactment of comparative fault, K.S.A. 60-258a(a) has provided that contributory negligence will not prevent a plaintiff from recovering damages if that plaintiff’s negligence was less than the causal negligence of the other parties to the occurrence. Instead, the plaintiff’s damages will be diminished in proportion to the amount of negligence attributed to the plaintiff.”

Syllabus ¶ 6. “The rationale for retaining the assumption of risk doctrine is no longer viable in Kansas given statutory comparative fault rules and subsequent caselaw. Prior caselaw applying the assumption of risk doctrine to bar recovery is overruled.”

107.54**ASSUMPTION OF RISK—EMPLOYEE’S ACCEPTANCE OF
UNUSUAL CONDITION****Comment**

This instruction has been deleted. The Kansas Supreme Court in *Simmons v. Porter*, 298 Kan. 299, 312 P.3d 345 (2013) held as follows:

Syllabus ¶ 5. “Since the enactment of comparative fault, K.S.A. 60-258a(a) has provided that contributory negligence will not prevent a plaintiff from recovering damages if that plaintiff’s negligence was less than the causal negligence of the other parties to the occurrence. Instead, the plaintiff’s damages will be diminished in proportion to the amount of negligence attributed to the plaintiff.”

Syllabus ¶ 6. “The rationale for retaining the assumption of risk doctrine is no longer viable in Kansas given statutory comparative fault rules and subsequent caselaw. Prior caselaw applying the assumption of risk doctrine to bar recovery is overruled.”

107.55**FELLOW SERVANT DOCTRINE**

An employee assumes the risk of being injured as a result of the negligence of a fellow employee in the common conduct of their employer's work.

Notes on Use

For authority, see *Taylor v. Hostetler*, 186 Kan. 788, 352 P.2d 1042 (1960), where the fellow employee of a farm laborer was an eight-year-old boy driving a tractor. This instruction should be given when the defense asserts an injury was caused by a fellow employee. See PIK 4th 107.57 for an employer's duty in selecting fellow employees.

See also *Concannon, Administrator v. Taylor*, 190 Kan. 687, 378 P.2d 82 (1963).

107.56

FELLOW SERVANT DEFINED

Employees of the same employer engaged in the same general business, whose efforts tend to promote the same general purpose and accomplish the same general end, are fellow employees.

Notes on Use

For authority, see *Burroughs v. Michel*, 142 Kan. 814, 52 P.2d 633 (1935). This instruction should be given with PIK 4th 107.55, Fellow Servant Doctrine.

107.57

FELLOW SERVANT DOCTRINE—EMPLOYER’S DUTY

An employer has a duty to exercise reasonable care in the selection of (his) (her) employees. ([He] [She] must instruct those who are inexperienced or lack training) ([He] [She] must establish proper work rules and regulations for [his] [her] employees).

Notes on Use

For authority, see Comment under PIK 4th 107.53, Assumption of Risk—Ordering into Dangerous Situation. This instruction should be given with PIK 4th 107.55, Fellow Servant Doctrine, when applicable.

Comment

Under the fellow servant doctrine, fellow servants assume the risk of injuries from each other in their common conduct of the master’s work, but the master has the duty to exercise reasonable care in the selection of his servants and to furnish them with a reasonably safe place in which to work and reasonably safe materials, tools and appliances. *Taylor v. Hostetler*, 186 Kan. 788, 352 P.2d 1042 (1960); *Concannon, Administrator v. Taylor*, 190 Kan. 687, 378 P.2d 82 (1963).

“Although an employer may be liable for injuries to a third person which are the result of the incompetence or unfitness of an employee where the employer was negligent in employing or retaining the employee when the employer knew or should have known of such incompetence or unfitness of the employee, liability normally only attaches to acts occurring at the employer’s business location or committed during the conduct of the employer’s business.

“In order to find an employer liable for negligently hiring or retaining an employee, there must be some causal relationship between the dangerous propensity or quality of the employee, of which the employer has or should have knowledge, and the injuries suffered by the third person; the employer must, by virtue of knowledge of the employee’s particular quality or propensity, have reason to believe that an undue risk of harm exists to others as a result of continued employment of that employee; and the harm which results must be within the risk created by the known propensity.

“Employers are not required to ascertain the detailed history of every employee, nor must they terminate the employment of an individual who is performing acceptable services and is clearly not unfit or incompetent, but who does pose some degree of risk due to previous actions.” *Schmidt v. HTG, Inc.*, 265 Kan. 372, Syl. ¶¶ 9-11, 961 P.2d 677 (1998).

A. INTRODUCTORY INSTRUCTION**121.01****VIOLATION OF LAW CONSTITUTES NEGLIGENCE**

Negligence is the lack of reasonable care. Reasonable care requires all persons who use the streets and highways to obey the rules of the road. You must decide from the evidence whether any of the following rules apply in this case and whether any rules have been violated. The violation of any of these rules is negligence.

Notes on Use

The court should give this instruction immediately before the court instructs the jury about the applicable rules of the road.

Comment

The following quotation from *Blakeman v. Lofland*, 173 Kan. 725, 252 P.2d 852 (1953), points out the duty of the court to determine whether or not the evidence warrants the giving of a particular instruction:

“[I]nstructions should fairly present the law applicable to the theory of the parties to the case. . . . [O]rdinarily it is the duty of the trial court to instruct on the sections of the motor vehicle act applicable to the facts established by the evidence.” 173 Kan. at 732.

The court is not required to define every phrase used in an instruction unless from a reading of the instruction as a whole there is a likelihood the jury will be misled or left to speculate without further explanation. *McGlothlin v. Wiles*, 207 Kan. 718, 487 P.2d 533 (1971).

B. COMMON LAW DUTIES

121.02

CONTROL OF VEHICLE/RANGE OF VISION

A driver on a public highway must use reasonable care to keep the vehicle under control. A driver must also drive within the range of *(his) (her)* vision [provided by the vehicle's headlights] in order to avoid colliding with any other vehicle using the highway.

Notes on Use

See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

This instruction should be given in most automobile negligence cases, along with PIK 4th 121.03, Lookout. If the case involves a nighttime collision, include the bracketed language.

Comment

Authority for this instruction may be found in many Kansas decisions, such as *Drennan v. Penn. Casualty Co.*, 162 Kan. 286, 176 P.2d 522 (1947), *Henderson v. National Mutual Cas. Co.*, 164 Kan. 109, 187 P.2d 508 (1947), and *Deemer v. Reichart*, 195 Kan. 232, 404 P.2d 174 (1965), where many of the cases are analyzed.

The “range of vision” rule is subject to qualification and exception when there is a sudden change in the motorist’s situation not caused by his own failure or neglect. Factors that may qualify and except the rule are: the color and condition of an offending vehicle parked in a traffic lane at night, *Secrist v. Turley*, 196 Kan. 572, 412 P.2d 976 (1966), *Newman v. Case*, 196 Kan. 689, 413 P.2d 1013 (1966), and *Abston v. Medora Grain, Inc.*, 206 Kan. 727, 482 P.2d 692 (1971); the sudden emergence of blinding lights, *Schenck v. Thompson*, 201 Kan. 608, 443 P.2d 298 (1968), *Baze v. Groff*, 205 Kan. 736, 473 P.2d 59 (1970), and *Diaz v. Duke*, 206 Kan. 650, 482 P.2d 48 (1971); a knoll, rise or change in grade causing the obstruction, motor vehicle or other object to be hidden, *Popejoy Construction Co. v. Crist*, 214 Kan. 704, 522 P.2d 180 (1974), *Cooper v. Eberly*, 211 Kan. 657, 508 P.2d 943 (1973), and *Newman v. Case*, 196 Kan. 689, 413 P.2d 1013 (1966); leaving an unlighted obstruction on the highway after it has turned dark, *Kelley v. Broce Construction Co., Inc.*, 205 Kan. 133, 468 P.2d 160 (1970); and the blending of an unlighted object with a street or general background, *Cooper v. Eberly*, 211 Kan. 657, 508 P.2d 943 (1973), *Newman v. Case*, 196 Kan. 689, 413 P.2d 1013 (1966), and *Abston v. Medora Grain, Inc.*, 206 Kan. 727, 482 P.2d 692 (1971).

The principle involved as stated in the exception is that a person cannot create an obstruction or hazard on the highway and escape liability.

The giving of PIK 8.02 [antecedent of PIK 4th 121.02] was approved as stating the common law duty of a driver in *Van Hoozer v. Farmers Insurance Exchange*, 219 Kan. 595, 549 P.2d 1354 (1976).

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121.03**LOOKOUT****A. In General**

A driver on a public highway must keep a proper lookout for other vehicles and objects in *(his) (her)* line of vision that may affect *(his) (her)* use of the highway.

The driver is presumed to see those things a person would and could see while exercising reasonable care under similar circumstances.

B. Lookout to Rear

A driver must keep a lookout to the rear only if the movement of *(his) (her)* vehicle may affect the operation of a vehicle to the rear.

Notes on Use

See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Instruction A should be given in virtually all automobile negligence cases as part of the common law duty of a driver. It covers those situations requiring lookout ahead and laterally. Where lookout to the rear is involved, use instruction B.

Comment

Authority for instruction A may be found in *Bottenberg Implement Co. v. Sheffield*, 171 Kan. 67, 229 P.2d 1004 (1951), and *Jarboe v. Pine*, 189 Kan. 44, 366 P.2d 783 (1961).

See Comment under PIK 4th 121.02, Control of Vehicle/Range of Vision.

PIK 8.03 [PIK 4th 121.03] was referred to in *Hampton v. State Highway Commission*, 209 Kan. 565, 498 P.2d 236 (1972), superseded by statute as stated in *Force v. City of Lawrence*, 17 Kan. App. 2d 90, 838 P.2d 896 (1992).

The giving of PIK 8.03B [PIK 4th 121.03B] was held to be error under the facts disclosed by the evidence in *Hallett v. Stone*, 216 Kan. 568, 534 P.2d 232 (1975), and *Jones v. Spencer*, 220 Kan. 445, 553 P.2d 300 (1976). Authority for the instruction and its applicability is discussed in both cases.

In *Kuhl v. Atchison, Topeka & Santa Fe Rwy. Co.*, 250 Kan. 332, 337, 827 P.2d 1 (1992), it was held proper for the trial court to give PIK 2d 8.03B [PIK 4th 121.03B] where there was evidence that the failure to keep a lookout to the rear was a proximate cause of the rear end collision.

121.04**ASSURED CLEAR DISTANCE****Comment**

The Committee recommends that no instruction on this subject be given because Kansas does not recognize the doctrine as such. The essence of the doctrine is covered by PIK 4th 121.02, Control of Vehicle/Range of Vision, and Comment.

II. DEFINITIONS

121.08

STATUTORY DEFINITIONS

Comment

Definitions under the Uniform Act Regulating Traffic on Highways are found at K.S.A. 8-1401 *et seq.* As a general rule, where statutory provisions are quoted and contain words defined in the statute, the jury should be instructed as to those definitions. *Long v. Shafer*, 162 Kan. 21, 174 P.2d 88 (1946). In the *Long* case, it was held the refusal of the trial court to define the words “roadway” and “intersection” was not error in the light of the evidence. Obvious definitions are not needed in motor vehicle instructions and should be included only when a genuine issue is presented by the evidence as to whether or not a statute applies, for example, when evidence is conflicting on whether or not an area involved constituted an “intersection.” No instruction is submitted on this subject as the definitions are self-explanatory and they will be rarely applicable, depending on the issues and evidence.

III. TRAFFIC CONTROL DEVICES AND SIGNALS

121.09

TRAFFIC CONTROL DEVICES

A driver must obey an official traffic control device, unless otherwise directed by a traffic or police officer.

Notes on Use

For authority, see K.S.A. 8-1507. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. The statute grants an exception to a driver of an authorized emergency vehicle. For exceptions granted emergency vehicles see PIK 4th 121.14, Authorized Emergency Vehicles—Privileges—Conditions.

Traffic control signal is defined in K.S.A. 8-1478.

Comment

If the traffic control device is not in a proper position or sufficiently legible to be seen by an ordinarily observant person, the applicable provision of the uniform traffic act should not be enforced. See K.S.A. 8-1507(b). This could involve a contested issue of fact requiring appropriate instructions to be given to the jury. In this respect two recent presumptions have been provided by statute in K.S.A. 8-1507(c) and (d). The first presumption provides that whenever an official traffic control device is placed in position approximately conforming to the requirements of the traffic act, then the device shall be presumed to have been so placed by the official act or direction of lawful authority, unless the contrary shall be established by competent evidence. The second presumption states that when any official traffic control device is placed pursuant to the uniform act and purports to conform to the lawful requirements for the device, then the device shall be presumed to comply with the requirements of the uniform act, unless the contrary shall be established by competent evidence.

Amber lights placed upon a highway construction or maintenance vehicle are traffic control devices under K.S.A. 8-1507(a). The trial court erred in failing to give an instruction based on K.S.A. 8-1531(a). *Sterba v. Jay*, 249 Kan. 270, 276, 816 P.2d 379 (1991).

121.10

TRAFFIC CONTROL LIGHTS—VEHICULAR

A. Green Light

The driver of a vehicle approaching a green light may proceed straight through, or turn right or left, unless a sign prohibits either turn. But if there are other vehicles or pedestrians lawfully within the intersection or an adjacent crosswalk, the driver must yield the right of way.

B. Green Arrow

The driver of a vehicle approaching a green arrow [in combination with another signal] may enter the intersection cautiously, but only to move in the direction of the arrow [or to move as allowed by other signals]. But if there are other vehicles or pedestrians lawfully within the intersection or an adjacent crosswalk, the driver must yield the right of way.

C. Steady Yellow Light or Arrow

A steady yellow light or yellow arrow warns the driver that the red light is about to appear and when it does, the driver cannot enter the intersection.

D. Steady Red Light or Arrow in General

The driver of a vehicle approaching a steady red light or red arrow must stop *(at a clearly marked stop line, if there is one) (at the crosswalk on the near side of the intersection, if there is no clearly marked stop line) (before entering the intersection, if there is no crosswalk at the near side of the intersection)* until there is a signal to proceed.

[Except the driver may make a right turn cautiously after stopping unless a sign is in place prohibiting a right turn. The driver must yield the right of way to any vehicle in the intersection or approaching on another roadway if that vehicle would be an immediate hazard while the driver is moving across or within the intersection or junction of roadways. The driver making the right turn must yield the right of way to pedestrians or traffic lawfully within the intersection or an adjacent crosswalk].

[Except that a driver may make a left turn cautiously after stopping if the driver is on a one-way roadway and is approaching a one-way roadway

to the left of the vehicle unless a sign is in place prohibiting a left turn. The driver must yield the right of way to any vehicle in the intersection or approaching on another roadway if that vehicle would be an immediate hazard while the driver is moving across or within the intersection or junction of roadways. The driver making the left turn must yield the right of way to pedestrians or traffic lawfully within the intersection or an adjacent crosswalk].

E. Motorcycle Driver or Bicycle Rider at Red Light or Arrow

(The driver of a motorcycle) (A person riding a bicycle) facing a steady red signal, which fails to change to a green light within a reasonable period of time because (of a signal malfunction) (the signal has failed to detect the arrival of the [motorcycle] [bicycle] because of its size or weight) has the right to proceed subject to the following rules:

The (driver) (rider) must first stop and yield the right-of-way to:

- 1. any vehicle that is in or near the intersection or approaching on a roadway and is so close as to constitute an immediate hazard;**
- 2. pedestrians lawfully within an adjacent cross-walk; and**
- 3. other traffic lawfully using the intersection.**

F. Signals Placed other than at Intersection

When an official traffic control signal is placed somewhere other than an intersection and a stop is required, the driver must stop at a sign or at a marking on the pavement which indicates where the stop should be made or at the signal if there is no sign or marking.

Notes on Use

For authority, see K.S.A. 8-1508. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. K.S.A. 8-1508(d) makes the provisions of the statute applicable to signals erected at a place other than an intersection and provides where the stop shall be made.

Part E applies to cases arising on or after July 1, 2011.

Traffic control signal is defined in K.S.A. 8-1478. See PIK 4th 121.37, Pedestrians Subject to Signals, PIK 4th 121.38, Pedestrians' Right of Way, and PIK 4th 121.39, Pedestrian Must Yield—Duty of Driver, for pedestrians' rights and duties when traffic control signals are in operation.

Comment

Statute on pedestrian right of way is cited in *Collins v. Wichita Transportation Corp.*, 177 Kan. 677, 281 P.2d 1102 (1955).

The rights and duties of parties approaching traffic lights are discussed in *Wilson v. Cyrus*, 180 Kan. 836, 308 P.2d 98 (1957).

In *Daugharthy v. Bennett*, 207 Kan. 728, 486 P.2d 845 (1971), the court held that the trial court properly refused a requested instruction that a “slow” sign gives a preferential right of way at an intersection since such a sign is not authorized by statute.

The court in *Kendrick v. Manda*, 38 Kan. App. 2d 864, 174 P.3d 432 (2008), clarified that a bicycle is not defined as a vehicle for purposes of the Rules of the Road in Kansas, nor is a bicyclist defined as a pedestrian. However, if a bicyclist operates a bicycle on a roadway, the bicyclist has the same rights and duties applicable to drivers of vehicles. Likewise, if a bicyclist uses a sidewalk, the bicyclist has the same rights as a pedestrian and is not subject to vehicular traffic laws. See also *Schallenberger v. Rudd*, 244 Kan. 230, 235, 767 P.2d 841 (1989).

121.11

FLASHING LIGHTS

A. When a red light is flashing, a driver must stop before entering the nearest crosswalk at an intersection or at a marked limit line. After stopping, the driver may proceed using the same rules that apply when a driver stops at a stop sign.

B. When a yellow light is flashing a driver may proceed cautiously through the intersection or past the signal.

Notes on Use

For authority, see K.S.A. 8-1510. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. See PIK 4th 121.31, Entering Through Highway—Stop Signs, for rules governing the right to proceed after stopping for a stop sign.

Under instruction A, the right to proceed is subject to the rules applicable after making a stop at a stop sign. The statute does not apply to railroad grade crossings.

121.12**LANE-DIRECTION—CONTROL LIGHTS**

When lane control lights are placed over individual lanes on a street or highway:

A. Green Light

Traffic may travel in any lane over which a green light is shown.

B. Steady Yellow Light

Traffic is warned that a lane control change is about to occur.

C. Steady Red Light

Traffic must not enter or travel in any lane over which a red light is shown.

D. Flashing Yellow Light

Traffic may use the lane to approach and make a left turn.

Notes on Use

For authority, see K.S.A. 8-1511. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

IV. SPEED LIMITS AND REGULATIONS**121.13****SPEED LIMITS**

A. No person shall drive a vehicle at a speed greater than is reasonable under the conditions and hazards then existing.

B. At the time and place and with the vehicle involved in this case, any speed in excess of _____ miles per hour was unlawful. (*Insert in the blank the appropriate speed limit from below*).

- **30 miles per hour in any urban district**
- **75 miles per hour on any separated multilane highway as designated and posted by the Secretary of Transportation**
- **55 miles per hour on any county or township highway**
- **65 miles per hour on all other highways**
- **the speed determined and declared by the Secretary of Transportation or a local authority as the maximum speed permitted at the location**

C. The driver of every vehicle shall drive at a safe and appropriate speed when _____ (*insert applicable phrase or phrases*).

- **approaching and crossing an intersection**
- **approaching and crossing a railroad grade crossing**
- **approaching or going around a curve**
- **approaching a hill crest**
- **traveling on any narrow or winding narrow roadway**
- **special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions**

Notes on Use

For authority, see K.S.A. 8-1557, 8-1558, and 8-1559.

The Secretary of Transportation, Kansas Turnpike Authority, and local authorities are permitted to set greater or lesser speed limits and to erect appropriate signs giving notice thereof not to exceed limits set out by statute. K.S.A. 8-1558(b) authorizes the board of education of any school district to establish lower maximum speed limits for the operation of such district's school buses. The 75 mile-per-hour speed limit noted in part B only applies to cases arising on or after July 1, 2011. Prior to July 1, 2011, the appropriate speed limit was 70 miles per hour.

Rural interstate highways are highways outside urbanized areas. Urbanized areas are designated as such by the Bureau of Census, and state and local authorities (23 U.S.C. 101).

The Secretary of Transportation and local authorities may establish the speed limits within road construction zones under their respective jurisdictions. The speed limit is effective when appropriate signs giving notice thereof are erected. “Road construction zone” means the portion of a highway that is identified as having a construction or maintenance work area. The zone starts at the first sign identifying the zone and continues until a posted or moving sign indicates that the road construction zone has ended.

When a speed limitation statute is applicable, always give part A; when part B is applicable, fill in the blank with the appropriate figure depending on place, time, and type of vehicle.

Comment

The question of what was a reasonable and proper speed under the circumstances is one for the jury. *Fisher v. Central Surety & Ins. Corp.*, 149 Kan. 38, 86 P.2d 583 (1939).

PIK 8.12(a) [PIK 4th 121.13A] was approved by reference in *Muhn v. Schell*, 196 Kan. 713, 718, 413 P.2d 997 (1966).

PIK 8.12(c) [PIK 4th 121.13C] was cited, and its application discussed, in *Prior v. Best Cabs, Inc.*, 199 Kan. 77, 80, 427 P.2d 481 (1967).

A “slow sign” is not recognized by statute to establish a preferential right of way at an intersection. See *Daugharthy v. Bennett*, 207 Kan. 728, 486 P.2d 845 (1971).

For authority for PIK 8.12(c) [PIK 4th 121.13C], see *Eckdall v. Negley*, 5 Kan. App. 2d 724, 725-27, 624 P.2d 473 (1981).

Failure to give PIK 8.12(b) [PIK 4th 121.13B] was held to be reversible error. *Guillan v. Watts*, 249 Kan. 606, 617-18, 822 P.2d 582 (1991).

121.14

**AUTHORIZED EMERGENCY VEHICLES—PRIVILEGES—
CONDITIONS**

A. The driver of an authorized emergency vehicle, when *(responding to an emergency call) (in the pursuit of an actual or suspected violator of the law) (responding to, but not upon returning from, a fire alarm)*, may exercise the privilege to _____ *(insert appropriate phrase from below)*.

- park or stand
- proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation
- exceed the maximum speed limits so long as *(he) (she)* does not endanger life or property
- disregard regulations governing direction of movement or turning in specified directions

B. The privilege granted to the driver of an authorized emergency vehicle shall apply only when the vehicle is making use of a *(siren) (whistle) (bell)* that is capable of emitting sound audible under normal conditions from a distance of not less than 500 feet and of a type approved by the Secretary of Transportation and *(visual signal lamps mounted as high and as widely spaced laterally as practicable, which shall be capable of displaying to the front two alternately flashing red lights located at the same level and to the rear two alternately flashing red lights located at the same level) (one rotating or oscillating light, which shall be mounted as high as practicable on such vehicle and which shall display to the front and rear of such vehicle [a flashing red light] [alternate flashes of red and white lights in combination] [alternate flashes of red and blue lights in combination])* and these lights shall have sufficient intensity to be visible at five hundred feet in normal sunlight. [A police vehicle when used as an emergency vehicle, may but need not be, equipped with (here enter appropriate description of lamps or lights from K.S.A. 8-1720 or 8-1722).]

C. The privilege does not relieve the driver of an authorized emergency vehicle of the duty to drive with due regard for the safety of others. The operation of the emergency vehicle [, including the decision to initiate or continue a pursuit] may not be done in reckless disregard for the safety of others.

Notes on Use

For authority, see K.S.A. 8-1506. For a definition of “authorized emergency vehicle,” see K.S.A. 8-1404.

See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Parts A, B, and C should be given in all cases involving an authorized emergency vehicle. The appropriate parentheticals under parts A and B that are applicable from the evidence should be selected.

Under part B, the contents of the applicable audible signal under K.S.A. 8-1738 and the visual signals under K.S.A. 8-1720 have been included.

Part C was amended to reflect the Supreme Court's holding in *Robbins v. City of Wichita*, 285 Kan. 455, 172 P.3d 1187 (2007).

Comment

The standard of care required of the driver of an emergency police vehicle is the standard of care of a reasonable man in the discharge of official duties of a like nature under like circumstances. *Scogin v. Nugen*, 204 Kan. 568, 464 P.2d 166 (1970).

When a police vehicle is used as an authorized emergency vehicle, appropriate changes in the instruction may be necessary in view of K.S.A. 8-1506(c) and 8-1722(d).

In *Shawnee Township Fire District v. Morgan*, 221 Kan. 271, 278, 559 P.2d 1141 (1977), it was held that the phrase "ordinary negligence" is no longer applicable to the driver of an emergency vehicle and should not be used in instructions to the jury in actions involving emergency vehicles. The test of due care as applied to the driver of an emergency vehicle is whether, with the privileges and immunities provided by statute, he or she acted as a reasonably careful driver. The holding of the court in *Scogin v. Nugen*, 204 Kan. 568, 464 P.2d 166 (1970) was modified in view of the adoption of K.S.A. 8-1530.

In *Robbins v. City of Wichita*, 285 Kan. 455, 172 P.3d 1187 (2007), the Supreme Court held that the "due care" required of a police officer driving an authorized emergency vehicle (K.S.A. 8-1506[d]) applies not only to the officer's physical operation of the vehicle, but also to the decision to chase or continue to chase a law violator. The court went on to state that the standard of care for evaluating whether the driver of an emergency vehicle breached the statutory duty to drive with due regard for the safety of others is "reckless disregard." The Supreme Court further cited with approval the definition found in PIK 3d 70.04, Reckless Driving [now PIK 4th 66.060].

K.S.A. 8-1506 does not grant absolute immunity to emergency vehicle drivers but does grant certain privileges not available to others. Although not one of the privileges enumerated in K.S.A. 8-1506(b)(4) and (d), the legislature intended to permit an authorized emergency vehicle to pass in a no passing zone, so long as such passing does not endanger the safety of others. *State v. Simpson*, 11 Kan. App. 2d 666, 732 P.2d 788 (1987).

In *Littell v. Maloney*, 3 Kan. App. 2d 240, 593 P.2d 11 (1979), it was determined that the operator of an authorized emergency vehicle who is responding to an emergency call is granted special privileges of the statute only when the operator is making use of the audible signal required under K.S.A. 8-1506 and 8-1738(d). This case involved a police officer on a motorcycle directing traffic for a funeral procession who was not sounding a siren when struck by an automobile. The court stated that since the motorcycle was not being operated as an authorized emergency vehicle, the trial court did not err in failing to instruct on the test of due care for a driver of an emergency vehicle or on the duty of a motorist to yield to an emergency vehicle.

V. DRIVE ON RIGHT—FOLLOWING—OVERTAKING—PASSING

121.15

DRIVE ON RIGHT SIDE

Upon all roadways of sufficient width, a vehicle shall be driven on the right half of the roadway, except

(when overtaking and passing another vehicle.)

(when an obstruction exists making it necessary to drive to the left of the center of the highway provided, that a person so doing shall yield to vehicles traveling in the proper direction upon the unobstructed portion of the highway within such a distance as to constitute an immediate hazard.)

(upon a roadway divided into three marked lanes.)

(upon a roadway designated and sign-posted for one-way traffic.)

Notes on Use

For authority, see K.S.A. 8-1514(a). See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.16**DRIVE ON RIGHT SIDE—DEFILES, CANYONS OR STEEP GRADES**

The driver of a motor vehicle traveling through defiles or canyons or on highways with steep grades shall hold the motor vehicle under control and as near the right-hand edge of the roadway as reasonably possible and, except when driving entirely to the right of the center of the roadway, shall give audible warning with the horn of the motor vehicle upon approaching any curve where the view is obstructed within a distance of 200 feet along the highway.

Notes on Use

For authority, see K.S.A. 8-1579. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.17**DRIVE ON RIGHT SIDE—FOUR OR MORE LANES**

Upon any roadway having four or more lanes for moving traffic and providing for two-way movement of traffic, no vehicle shall be driven to the left of the center line of the roadway, except

(when authorized by official traffic control devices.)

(when an obstruction exists making it necessary to drive to the left of the center of the roadway a person so doing shall yield to vehicles traveling in the opposite direction within such a distance as to constitute an immediate hazard.)

This provision shall not be construed as prohibiting the crossing of the center line in making a left turn into or from an alley, private road or driveway.

Notes on Use

For authority, see K.S.A. 8-1514(c). See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

The statutory provisions concerning a left turn are discussed in *Every v. Jefferson Ins. Co. of N.Y.*, 4 Kan. App. 2d 715, 610 P.2d 645 (1980).

121.18**PASSING VEHICLES PROCEEDING IN OPPOSITE DIRECTIONS**

Drivers of vehicles proceeding in opposite directions shall pass each other to the right.

(Upon roadways having a width for not more than one line of traffic in each direction, each driver shall give to the other at least one-half of the main-traveled portion of the roadway as nearly as possible.)

Notes on Use

For authority, see K.S.A. 8-1515. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.19**OVERTAKING A VEHICLE ON THE LEFT****A. Rules Governing**

The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle. The driver of an overtaken vehicle (except when overtaking and passing on the right is permitted) shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of *(his) (her)* vehicle until completely passed by the overtaking vehicle.

B. Limitations

No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless the left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit the overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to an authorized lane of travel as soon as practicable and, in the event the passing movement involves the use of a lane authorized for vehicles approaching from the opposite direction, before coming within 200 feet of any vehicle approaching from the opposite direction.

C. Prohibited Passing

No vehicle shall be driven to the left side of the roadway under the following conditions: (1) when approaching or upon the crest of a grade or a curve in the highway where the driver's view is obstructed within such distance as to create a hazard in the event another vehicle might approach from the opposite direction; (2) when approaching within 100 feet of or traversing any intersection or railroad-grade crossing; (3) when the view is obstructed upon approaching within 100 feet of any bridge, viaduct or tunnel. (The foregoing limitations do not apply on a one-way roadway.)

D. No Passing Zones

Where signs or markings are in place to define a no passing zone no driver shall at any time drive on the left side of the roadway within such no passing zone or on the left side of any pavement striping designed to mark such no passing zone through its length.

E. Overtaking and Passing Bicycles

The driver of a vehicle overtaking a bicycle proceeding in the same direction shall pass to the left at a distance of not less than three feet and shall not again drive to the right side of the roadway until safely clear of the bicycle.

F. Passing a Bicycle in a No-Passing Zone

The driver of a vehicle may pass a bicycle proceeding in the same direction in a no-passing zone only when it is safe to do so.

G. Approaching a Stationary Waste Collection Vehicle

The driver of a motor vehicle approaching a stationary waste collection vehicle obviously and actually engaged in waste collection and displaying vehicular hazard warning signal lamps shall proceed with due caution, and if safely possible, change to a lane not adjacent to that of the waste collection vehicle, or if it is not possible to change lanes safely, reduce speed.

Notes on Use

For authority for part A, see K.S.A. 8-1516; part B, see K.S.A. 8-1518; part C, see K.S.A. 8-1519; part D, see K.S.A. 8-1520(b); and for part G, see K.S.A. 8-15,112. Parts C and D do not apply under the conditions described in K.S.A. 8-1514(a)(2) or when the driver of a vehicle is turning left into or from an alley, private road or driveway. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Part C(2) does not apply to any intersection on a state or county maintained highway located outside city limits unless the intersection is marked by an official department of transportation or county road department traffic control device or pavement markings or both indicating that passing is prohibited and such marking is placed at least 100 feet before the intersection.

Parts E and F apply only to cases arising on or after July 1, 2011. Part G applies only to cases arising on or after July 1, 2018.

Comment

In *Peoples Bank of Pratt v. Integral Ins. Co.*, 251 Kan. 809, 817, 840 P.2d 503 (1992), it was held error to give an instruction related to the duty of a driver passing another vehicle when approaching within 100 feet of an intersection in a case where the intersection was not marked by any official traffic control device or pavement marking as required by K.S.A. 8-1519.

121.20

OVERTAKING A VEHICLE ON THE RIGHT

The driver of a vehicle may overtake and pass upon the right of another vehicle only:

- 1. When the vehicle overtaken is making or about to make a left turn; or**
- 2. Upon a roadway with unobstructed pavement of sufficient width for two or more lines of vehicles moving lawfully in the direction being traveled by the overtaking vehicle.**

A driver may overtake and pass upon the right only under conditions permitting these movements in safety. These movements shall not be made by driving off the roadway.

Notes on Use

For authority, see K.S.A. 8-1517. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.21

DIVIDED HIGHWAYS

No person shall:

A. Driving Between Roadways

Drive a vehicle over, upon or across any intervening space, physical barrier or a clearly indicated dividing section so constructed as to impede vehicular traffic between roadways on divided highways.

B. Turns on Roadway

Make a left turn or a semicircular or “U” turn on the interstate system.

C. Turns Between Roadways

Make a left turn or a semicircular or “U” turn over, across or within any intervening space, physical barrier or a clearly indicated dividing section so constructed as to impede vehicular traffic between roadways on a divided highway, except when making a left turn or a semicircular or “U” turn through an opening provided and surfaced for the purpose of public use for such turning movement.

D. Turns Where Prohibited by a Sign

Make a left turn or a semicircular or “U” turn on a divided highway wherever such turn is specifically prohibited by a sign or signs placed by the authority having jurisdiction over that highway.

E. Driving on Divided Highway

Drive any vehicle on a divided highway except on the proper roadway provided for that purpose and in the proper direction and to the right of the intervening space, physical barrier or a clearly indicated dividing section so constructed as to impede vehicular traffic between roadways unless directed or permitted to use another roadway by official traffic-control devices or police officers.

F. Entering or Leaving Controlled-access Highway

Drive any vehicle onto or from any controlled-access highway except at such entrances and exits as are established by the authority having jurisdiction over such highway.

G. Servicing Adjacent Property

Use controlled-access highway right of way for parking vehicles or mobile equipment, or stacking of materials or equipment, for the purpose of servicing adjacent property.

H. Stopping on Right of Way

Stop, stand or park vehicles on the right of way of controlled-access highways except for:

- stopping of disabled vehicles;
- stopping to give aid in an emergency;
- stopping in compliance with directions of a police officer or other emergency or safety official;
- stopping due to illness or incapacity of driver; or
- parking in designated parking or rest areas.

Notes on Use

For authority, see K.S.A. 8-1524. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.22**ONE-WAY TRAFFIC AND ROTARY TRAFFIC ISLANDS****A. One-way Traffic**

Upon a roadway designated for one-way traffic, a vehicle shall be driven only in the direction designated at all or such times as shall be indicated by official traffic control devices.

B. Rotary Traffic Islands

A vehicle passing around a rotary traffic island shall be driven only to the right of such island.

Notes on Use

For authority, see K.S.A. 8-1521(b) and (c). See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.23**ROADWAYS LANED FOR TRAFFIC****A. Two or More Lanes**

Whenever any roadway has been divided into two or more clearly marked lanes for traffic, a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety.

B. Three Lanes

Whenever any roadway has been divided into three lanes and provides for two-way movement of traffic, a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle traveling in the same direction when the center lane is clear of traffic within a safe distance, or in preparation for making a left turn or where the center lane is at the time allocated exclusively to traffic moving in the same direction that the vehicle is proceeding and the allocation is designated by official traffic-control devices.

C. Two Lanes in Same Direction

Whenever any highway located outside the corporate limits of any city is divided into two lanes of traffic proceeding in the same direction, all vehicles shall be driven in the right lane except when:

1. overtaking and passing another vehicle;
2. preparing to make a proper left turn;
3. otherwise directed by official traffic-control devices; or
4. otherwise required by other provisions of law.

This rule does not apply to authorized emergency vehicles, law enforcement vehicles, Kansas turnpike authority vehicles, or department of transportation vehicles performing construction or maintenance work.

D. Three or More Lanes in Same Direction

Whenever any highway located outside the corporate limits of any city is divided into three or more lanes of traffic proceeding in the same direction, vehicles shall not be driven in the far left lane except when:

1. overtaking and passing another vehicle;
2. preparing to make a proper left turn;
3. otherwise directed by official traffic-control devices; or

4. otherwise required by other provisions of law.

This rule does not apply to authorized emergency vehicles, law enforcement vehicles, Kansas turnpike authority vehicles, or department of transportation vehicles performing construction or maintenance work.

E. Lanes Designated by Signs

Official traffic-control devices may be erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway and the drivers of a vehicle shall obey the directions of every sign.

F. Prohibition Against Changing Lanes

Official traffic-control devices may be installed prohibiting the changing of lanes on sections of roadway and drivers of vehicles shall obey the directions of every device.

Notes on Use

For authority, see K.S.A. 8-1522. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.24

FOLLOWING TOO CLOSELY

A. General Rule

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway.

B. Trucks, Towing Vehicles

The driver of any truck or motor vehicle towing another vehicle when traveling upon a roadway outside of a business or residence district and which is following another truck or motor vehicle towing another vehicle shall leave sufficient space, whenever conditions permit, so that an overtaking vehicle may enter and occupy the space without danger, except that this shall not prevent a truck or motor vehicle towing another vehicle from overtaking and passing any vehicle or combination of vehicles.

C. Caravan or Motorcade

Motor vehicles driven outside of a business or residence district in a caravan or motorcade, whether or not towing other vehicles, shall be so operated as to allow sufficient space between each such vehicle or combination of vehicles so as to enable any other vehicle to enter and occupy such space without danger.

Notes on Use

For authority, see K.S.A. 8-1523. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

Part C does not apply to funeral processions. K.S.A. 8-1523(c).

VI. TURNING—STARTING—SIGNALS THEREON**121.25****TURNS****A. Right Turns**

When the driver of a motor vehicle intends to turn right, both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway.

B. Left Turns

The driver of a vehicle intending to turn left shall approach the turn in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle. When practical a left turn at an intersection shall be made to the left of the center of the intersection, and any left turn shall be made so as to leave the intersection or other location in the extreme left-hand lane lawfully available to traffic moving in the same direction as the vehicle on the roadway being entered.

C. Two-way Left Turn Lanes

Where a special lane for making left turns by drivers proceeding in opposite directions has been indicated by official traffic control devices: (1) a left turn shall not be made from any other lane; (2) a vehicle shall not be driven in the lane except when preparing for or making a left turn from or into the roadway or when preparing for or making a U-turn when otherwise permitted by law.

D. Signs and Markers

When the secretary of transportation or local authorities place official traffic-control devices at other locations requiring and directing a course to be traveled by turning vehicles, the driver of a vehicle shall turn as required and directed by such devices.

E. Turns in Opposite Direction

The driver of a vehicle shall not turn the vehicle to proceed in the opposite direction unless such movement can be made in safety and without interfering with other traffic.

Notes on Use

For authority for parts A, B, C and D, see K.S.A. 8-1545; part E, see K.S.A. 8-1546. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. Select the appropriate paragraph applicable to the evidence. See PIK 4th 121.30, Turning Left at Intersection—Yielding Right of Way, on yielding the right of way when making a left turn.

K.S.A. 8-1545(a) held not unconstitutionally vague or indefinite. *Guillan v. Watts*, 249 Kan. 606, 822 P.2d 582 (1991).

Comment

The above statute is quoted in the instructions in *Long v. Shafer*, 162 Kan. 21, 174 P.2d 88 (1946). It was held not to be error to refuse to instruct on statutory definitions of “intersection” and “roadway” under evidence of case. As a general rule, where a statutory provision is quoted which contains words defined in the statute, the jury should also be instructed as to those definitions.

The statutory provisions are quoted in *Gabel v. Hanby*, 165 Kan. 116, 193 P.2d 239 (1948), and discussed in determining the proper method for making a left turn.

PIK 2d 8.22a [PIK 4th 121.25A] was approved by reference in *Muhn v. Schell*, 196 Kan. 713, 718, 413 P.2d 997 (1966).

The effect of PIK 2d 8.22b [PIK 4th 121.25B] is to forbid premature turns before the intersection is actually reached. *Nirschl v. Webb*, 239 Kan. 90, 95-96, 716 P.2d 173 (1986).

121.26**WHEN SIGNALS REQUIRED****A. Signals on Turning from Direct Course**

No person shall turn a vehicle or move right or left upon a roadway unless and until the movement can be made with reasonable safety. No person shall turn any vehicle without giving an appropriate signal. A signal of intention to turn or move right or left when required shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning.

B. Signals on Stopping or Decreasing Speed

No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

C. Prohibited Use of Signal Lamps

Signals required on vehicles shall not be flashed on one side only on a disabled vehicle, flashed as a courtesy or “do pass” signal to operators of other vehicles approaching from the rear, nor be flashed on one side only of a parked vehicle except as may be necessary.

Notes on Use

For authority, see K.S.A. 8-1548. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

In *Atkins v. Bayer*, 204 Kan. 509, 464 P.2d 233 (1970), plaintiff suddenly applied his brakes when coming upon a road barricade at night and was struck from behind by defendant's auto. The court held that the sufficiency of the brake lights as an “appropriate signal” under the statute was a jury question. The court followed the rule as announced in *Johnston v. Ecord*, 196 Kan. 521, 412 P.2d 990 (1966), where a decedent suddenly applied his brakes to avoid hitting a dog in the road and was struck by a following auto, and held what constitutes an “appropriate signal” under the statute depends on the necessity for, and the driver's opportunity to give, an effective warning commensurate with the probable hazards revealed under the circumstances of the particular case.

Where the sudden decrease in the speed of a vehicle is actually observed without a signal, the party observing the decrease in speed has the same notice a signal would have imparted if given at that time, and the absence of a signal cannot be said to have been the cause of the collision. *Hallett v. Stone*, 216 Kan. 568, 534 P.2d 232 (1975).

In *Kuhl v. Atchison, Topeka & Santa Fe Rwy. Co.*, 250 Kan. 332, 339, 827 P.2d 1 (1992), the court approved giving the instruction on the duties of a driver imposed under K.S.A. 8-1548, 8-1549 and 8-1550.

In *State v. DeMarco*, 263 Kan. 727, 952 P.2d 1276 (1998), the court held that under K.S.A. 8-1548, a lane change signal must be made within 100 feet of the point where the vehicle makes the lane change, regardless of whether there is any traffic moving in front of or behind the vehicle.

121.27

METHOD OF GIVING SIGNALS**A. Method of Giving Turn Signals**

Any turn signal, when required by law, shall be given by signal lamps.

B. Method of Giving Stop Signals

Any stop signals, when required by law, shall be given by means of hand and arm or by signal lamps.

C. Method of Giving Stop and Turn Signals for Certain Pre-1953 and Special Interest Vehicles

The driver of *(any passenger car or truck less than eighty [80] inches in width, manufactured or assembled prior to January 1, 1953) (any vehicle registered under K.S.A. 8-194)*, when required by law to give a turn signal, shall do so either by means of hand and arm or by signal lamps.

D. Signals by Hand and Arm

All required signals by hand and arm shall be given from the left side of the vehicle and shall indicate as follows:

- left turn—hand and arm extended horizontally.
- right turn—hand and arm extended upward.
- stop or decrease speed—hand and arm extended downward.

Notes on Use

For authority, see K.S.A. 8-1549, 8-1550, 8-1708 and 8-1721. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. Parts C and D should be given only when the evidence warrants its submission to the jury.

The above instruction reflects legislative changes in K.S.A. 8-1549 and 8-1708(b) which makes it mandatory that turn signals be given by electric turn signals except in those situations covered in part C.

The 1974 version of K.S.A. 8-1549 specifically authorized both stop and turn signals to be given by hand and arm or by signal lamps. All authorization concerning stopping signals has been deleted from K.S.A. 8-1549. K.S.A. 8-1548 now provides that “[n]o person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal, in the manner provided herein ...” “The Committee is of the opinion that despite this legislative oversight that electric stop signals would be held to be appropriate.

Comment

The methods of giving hand and arm signals were considered in *Baze v. Groff*, 205 Kan. 736, 473 P.2d 59 (1970).

Kuhl v. Atchison, Topeka & Santa Fe Rwy. Co., 250 Kan. 332, 340, 827 P.2d 1 (1992) held that it was appropriate to instruct the jury on the method of giving signals when there was a factual question whether the accident would have occurred if the defendant driver had signaled her intention to turn or stop.

VII. RIGHT OF WAY

121.28

APPROACHING OR ENTERING INTERSECTION

When two vehicles approach or enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right.

Notes on Use

For authority, see K.S.A. 8-1526. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. The right of way rule is modified at through highways pursuant to K.S.A. 8-1526(b).

Comment

Facts disclosed an “intersection” and justified the giving of an instruction based upon K.S.A. 8-550 [antecedent of K.S.A. 8-1526] in *Cherry v. State Automobile Insurance Association*, 181 Kan. 205, 310 P.2d 907 (1957).

When the evidence presents an issue as to whether or not the area involved in the case constitutes an “intersection,” see K.S.A. 8-1428 for the statutory definition.

Where evidence disclosed a street controlled by stop signs crossed a through street, it was held error to instruct on the right of way provisions applicable to an intersection of two ordinary streets. *Heiserman v. Aikman*, 163 Kan. 700, 186 P.2d 252 (1947).

Courts have occasionally attempted to explain or qualify the right of way statute by additional instructions. For example, see the instructions set out in *Byas v. Dodge City Rendering Co.*, 177 Kan. 337, 279 P.2d 252 (1955) on page 341-2 of the opinion. The Committee does not recommend such instructions, for the reason that the application of the law to the facts of the case is a matter more properly left to counsel in his or her argument to the jury.

In *Meyer v. Stone*, 6 Kan. App. 2d 254, 627 P.2d 1155 (1981), it was held to be reversible error for the trial court to instruct the jury that, if a driver stopped at an open intersection, that driver had a duty to yield the right of way.

121.29

**ENTERING INTERSECTION, MARKED CROSSWALK OR
RAILROAD GRADE CROSSING—SUFFICIENCY OF SPACE**

No driver shall *(enter an intersection) (enter a marked crosswalk) (drive onto any railroad crossing)* unless there is sufficient space on the other side of *(the intersection) (crosswalk) (railroad grade crossing)* to accommodate the vehicle *(he) (she)* is operating without obstructing the passage of other vehicles, pedestrians or railroad trains notwithstanding any traffic-control signal indication to proceed.

Notes on Use

For authority, see K.S.A. 8-1584. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.30**TURNING LEFT AT INTERSECTION—YIELDING RIGHT OF WAY**

The driver of a vehicle intending to turn to the left within an intersection or into any alley, private road or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.

Notes on Use

For authority, see K.S.A. 8-1527. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. See PIK 4th 121.25, Turns, for general rules on the proper methods of turning at intersections. See PIK 4th 121.26, When Signals Required, and PIK 4th 121.27, Method of Giving Signals, for the instructions concerning when signals are required and the proper method of giving signals.

Comment

In *Kuhl v. Atchison, Topeka & Santa Fe Rwy. Co.*, 250 Kan. 332, 340, 827 P.2d 1 (1992), it was held that the failure of the trial court to give PIK 2d 8.28 [PIK 4th 121.30] was not error because, under the evidence, the defendant's failure to yield the right of way to oncoming traffic was not an issue in the case which involved a rear end collision.

In *Dawson v. Griffin*, 249 Kan. 115, 816 P.2d 374 (1991), the court held that a driver of a vehicle intending to turn to the left may not delegate the duty to yield the right of way imposed by K.S.A. 8-1527 to a phantom truck driver.

Dawson was cited and applied by the court in *Downing v. Kingsley*, 43 Kan. App. 2d 30, 35, 221 P.3d 115 (2009), in which the court held that the duty to yield the right of way could not be delegated, and the driver could not rely on a hand gesture of another vehicle operator waving the driver on through the intersection.

121.31

ENTERING THROUGH HIGHWAY—STOP SIGNS

Every driver of a vehicle approaching a stop sign shall stop (*at a clearly marked stop line, if there is one*) (*before entering the crosswalk on the near side of the intersection, if there is no clearly marked stop line*) (*at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it, if there is no crosswalk at the near side of the intersection*). After having stopped, the driver shall yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard and to any pedestrian within an adjacent crosswalk.

Notes on Use

For authority, see K.S.A. 8-1528(b). See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. See PIK 4th 121.32, Entering Through Highway—Yield Signs, Notes on Use and Comments.

Comment

If the motorist on a secondary or servient road knows that he is approaching a favored street or highway, the fact that the stop sign is obscured or obliterated or has become illegible is immaterial in respect to his negligence in failing to stop or otherwise recognize the preferential character of the favored highway. See *Schenck v. Thompson*, 201 Kan. 608, 443 P.2d 298 (1968).

The rights and duties of drivers approaching an intersection with stop or yield signs were discussed in *Harbaugh v. Darr*, 200 Kan. 610, 438 P.2d 74 (1968).

PIK 8.29 [PIK 4th 121.31], Entering Through Highway—Stop Signs, was cited with approval in *McGlothlin v. Wiles*, 207 Kan. 718, 487 P.2d 533 (1971). In *McGlothlin* the court held that a definition of the term “immediate hazard” was not required.

In *Meyer v. Stone*, 6 Kan. App. 2d 254, 255, 627 P.2d 1155 (1981), the court held that PIK 2d 8.29 and 8.30 [PIK 4th 121.31 and 121.32] should not be given where the intersection is not controlled by stop signs or yield signs.

121.32

ENTERING THROUGH HIGHWAY—YIELD SIGNS

The driver of a vehicle approaching a yield sign shall slow down to a speed reasonable for the existing conditions and, if required for safety to stop, shall stop (*at a clearly marked stop line, if there is one*) (*before entering the crosswalk on the near side of the intersection, if there is no clearly marked stop line*) (*at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it, if there is no crosswalk at the near side of the intersection*). After slowing or stopping, the driver shall yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard and to any pedestrian within an adjacent crosswalk.

Notes on Use

For authority, see K.S.A. 8-1528(c). See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

The Committee believes that no instruction should be given relating to the prima facie evidence provision as contained in K.S.A. 8-1528(c). The statutory provision refers to a rule of evidence and not to a presumption of negligence. Accordingly, its only application should be in determining whether as a matter of law there is sufficient evidence to justify the submission of the case to the jury under the theory of a failure to yield the right of way.

The duty of a driver to stop or yield before entering an intersection is discussed in *Revell v. Bennett*, 162 Kan. 345, 176 P.2d 538 (1947).

A driver approaching a “yield” sign must stop before entering an intersection and yield the right of way if an approaching vehicle is so close as to constitute an immediate hazard. The law of “stop” sign cases is applicable. *Harbaugh v. Darr*, 200 Kan. 610, 438 P.2d 74 (1968).

In *Meyer v. Stone*, 6 Kan. App. 2d 254, 255, 627 P.2d 1155 (1981), the court held that PIK 2d 8.29 and 8.30 [PIK 4th 121.31 and 121.32] should not be given where the intersection is not controlled by stop signs or yield signs.

121.33

ENTERING ROADWAY—NOT AT INTERSECTION

The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed.

Notes on Use

For authority, see K.S.A. 8-1529. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

The duty of a motorist entering a through highway from a private road or driveway was considered in *Cole v. Dirkson*, 202 Kan. 431, 449 P.2d 584 (1969), where a motorist backed into the street from a private driveway and in *Kelty v. Best Cabs, Inc.*, 206 Kan. 654, 418 P.2d 980 (1971), where a motorist entered a street from a filling station driveway.

121.34**AUTHORIZED EMERGENCY VEHICLE'S RIGHT OF WAY****A. Duty of Driver upon Approach of Authorized Emergency Vehicle**

Upon the immediate approach of an authorized emergency vehicle, when the driver is giving both an audible signal by siren, whistle, or bell, and visual signals by flashing red lights, the driver of every other vehicle shall yield the right of way, and shall immediately drive to a position parallel to and as close as possible to the right-hand edge or curb of the highway, clear of any intersection, and shall stop and remain in such position until the vehicle has passed (except when otherwise directed by a police officer).

B. Duty of Driver of Authorized Emergency Vehicle

The driver of an authorized emergency vehicle shall drive with due regard for the safety of others using the highway. The emergency vehicle may not be operated with reckless disregard for the safety of others using the highway.

Notes on Use

For authority, see K.S.A. 8-1530. For a definition of “authorized emergency vehicle,” see K.S.A. 8-1404.

Comment

In *Robbins v. City of Wichita*, 285 Kan. 455, 172 P.3d 1187 (2007), the Supreme Court stated that the standard of care for evaluating whether the driver of an emergency vehicle breached the statutory duty to drive with due regard for the safety of others is “reckless disregard.” The Supreme Court further cited with approval the definition found in PIK 3d 70.04, Reckless Driving [now PIK 4th 66.060].

121.35

BACKING OF MOTOR VEHICLE

The driver of a vehicle shall not back the vehicle unless movement can be made with safety and without interfering with other traffic. (The driver of a vehicle shall not back the vehicle upon any shoulder or roadway of any controlled-access highway.)

Notes on Use

For authority, see K.S.A. 8-1574. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. The parenthetical category should be given when the evidence warrants its submission.

121.36**COASTING DOWN GRADE****A. Driver of Any Motor Vehicle**

The driver of any motor vehicle when traveling upon a down grade shall not coast with the gears or transmission of the vehicle in neutral.

B. Driver of Truck or Bus

The driver of a truck or bus when traveling upon a down grade shall not coast with the clutch disengaged.

Notes on Use

For authority, see K.S.A. 8-1580. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

VIII. PEDESTRIANS' RIGHTS AND DUTIES**121.37****PEDESTRIANS SUBJECT TO SIGNALS**

A pedestrian shall obey the instructions of any official traffic-control device or pedestrian control signals specifically applicable to *(him)* *(her)* unless otherwise directed by a police officer.

Notes on Use

For authority, see K.S.A. 8-1532. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

In *Klaus v. Goetz*, 211 Kan. 126, 505 P.2d 726 (1973), the court construed the words “at all other places” as contained in K.S.A. 8-555 and concerning duties of pedestrians with control signals to refer to places on public highways with no traffic control signals. The same words are present in K.S.A. 8-1532(c) that replaced K.S.A. 8-555.

The court in *Kendrick v. Manda*, 38 Kan. App. 2d 864, 174 P.3d 432 (2008), clarified that a bicycle is not defined as a vehicle for purposes of the Rules of the Road in Kansas, nor is a bicyclist defined as a pedestrian. However, if a bicyclist operates a bicycle on a roadway, the bicyclist has the same rights and duties applicable to drivers of vehicles. Likewise, if a bicyclist uses a sidewalk, the bicyclist has the same rights as a pedestrian and is not subject to vehicular traffic laws. See also *Schallenberger v. Rudd*, 244 Kan. 230, 235, 767 P.2d 841 (1989).

121.38

PEDESTRIANS' RIGHT OF WAY**A. At Crosswalks without Signals**

When traffic-control signals are not in place or in operation the driver of a vehicle shall yield the right of way, slowing down or stopping to yield to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger.

B. Overtaking Vehicle Stopped for Pedestrian

Whenever any vehicle is stopped at any crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass the stopped vehicle.

C. Pedestrian to Remain in Safe Place

No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard.

D. Pedestrian Control Signals

Whenever special pedestrian control signals exhibiting the words “walk” or “don’t walk” or symbols of “walking persons” or “upraised palm” are in place, such signals shall indicate as follows:

1. “Flashing or steady walk or walking person.” Pedestrians facing the signal may proceed across the roadway in the direction of the signal and shall be given the right of way by the drivers of all vehicles.
2. “Flashing or steady don’t walk or upraised palm.” No pedestrian shall start to cross the roadway in the direction of the signal, but any pedestrian who has partially completed (*his*) (*her*) crossing on the “walk” signal shall proceed to a sidewalk or safety island while the “don’t walk” signal is showing.

E. Traffic Control Lights—Pedestrians

Whenever traffic is controlled by traffic control lights the following rules shall apply to pedestrians:

- 1. Unless otherwise provided by a pedestrian control signal, pedestrians facing any green signal may proceed across the roadway within any marked or unmarked crosswalk.**
- 2. Unless otherwise directed by a pedestrian control signal, pedestrians facing a steady yellow signal shall not start to cross the roadway.**
- 3. Unless otherwise directed by a pedestrian control signal, pedestrians facing a steady red signal shall not enter the roadway.**
- 4. A pedestrian may not proceed across a roadway when the sole green signal is a turn arrow.**

Notes on Use

For authority, see K.S.A. 8-1533 as to parts A, B, and C. See K.S.A. 8-1509 as to part D and K.S.A. 8-1508 for part E. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

Rights of pedestrians and drivers are discussed in *Townsend v. Jones*, 183 Kan. 543, 550, 331 P.2d 890 (1958).

121.39

PEDESTRIAN MUST YIELD—DUTY OF DRIVER**A. Not in Crosswalk**

Every pedestrian crossing a roadway at a point other than *(within a marked crosswalk) (within an unmarked crosswalk at an intersection)* shall yield the right of way to all vehicles upon the roadway.

B. Pedestrian Tunnel or Overhead

Any pedestrian crossing a roadway at a point where a *(pedestrian tunnel) (overhead pedestrian crossing)* has been provided shall yield the right of way to all vehicles upon the roadway.

C. Traffic Control between Intersections

Between adjacent intersections at which traffic-control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk.

D. Duty of Driver

Even if a driver of a vehicle has the right of way, *(he) (she)* shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing *(any child) (any confused person) (incapacitated person)* upon a road way.

E. Diagonal Crossing of Intersection

No pedestrian shall cross a roadway intersection diagonally unless authorized by official traffic-control devices; and, when authorized to cross diagonally, pedestrians shall cross only in accordance with the traffic-control devices pertaining to the crossing movements.

Notes on Use

For authority for parts A, B, C, and E, see K.S.A. 8-1534; for part D, see K.S.A. 8-1535. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. See PIK 4th 121.38, Pedestrians' Right of Way, and Notes on Use.

Comment

In *Walker v. Gerritzen*, 179 Kan. 400, 295 P.2d 635 (1956), it was contended deceased pedestrian was contributorily negligent as a matter of law in violating K.S.A. 8-557 [antecedent of K.S.A. 8-1534]. Whether or not a pedestrian is negligent in failing to yield the right of way to an oncoming vehicle was held to be a jury question under the facts and circumstances of the case. Other cases involving citation of K.S.A. 8-557 [antecedent of K.S.A. 8-1534] in connection with pedestrian crossing cases are: *Goodloe v. Jo-Mar Dairies Co.*, 163 Kan. 611, 185 P.2d 158 (1947), and *Hultberg v. Phillippi*, 169 Kan. 610, 220 P.2d 208 (1950).

An instruction essentially the same as PIK 2d 8.37 [PIK 4th 121.39], Pedestrian Must Yield—Duty of Driver, was approved in *Wegley v. Funk*, 201 Kan. 719, 443 P.2d 323 (1968).

PIK 2d 8.37 [PIK 4th 121.39], parts A and D were approved in *Reeve v. McBrearety*, 8 Kan. App. 2d 419, 420, 421, 660 P.2d 75 (1983).

121.40**PEDESTRIANS WALKING ON ROADWAYS****A. Where Sidewalks are Provided**

Where a sidewalk is provided (and its use is practical), it shall be unlawful for a pedestrian to walk along and upon an adjacent highway.

B. Where Sidewalks are not Provided

Where a sidewalk is not available, any pedestrian walking upon a highway shall walk only on a shoulder, as far as practical from the edge of the roadway.

C. Where Sidewalks and Shoulders are not Provided

Where neither a sidewalk nor a shoulder is available, any pedestrian walking upon a highway shall walk as near as practical to an outside edge of the roadway, and, if on a two-way roadway, shall walk only on the left side of the roadway.

D. Walking on Roadways—Right of Way

Any pedestrian walking upon a roadway other than at a crosswalk shall yield the right of way to all vehicles upon the roadway.

Notes on Use

For authority, see K.S.A. 8-1537. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.41**PEDESTRIANS—AUTHORIZED EMERGENCY VEHICLES—
DUTY OF DRIVER****A. Pedestrian Yielding the Right of way**

Upon the approach of an authorized emergency vehicle making use of audible and visual signals, or of a police vehicle properly and lawfully making use of an audible signal only, every pedestrian shall yield the right of way to the authorized emergency vehicle.

B. Duty of Driver of Authorized Emergency Vehicle

The driver of an authorized emergency vehicle shall drive with due regard for the safety of others using the highway and exercise due care to avoid colliding with any pedestrian. The operation of the emergency vehicle [, including the decision to initiate or continue a pursuit] may not be done in reckless disregard for the safety of others.

Notes on Use

For authority, see K.S.A. 8-1541. For a definition of “authorized emergency vehicle,” see K.S.A. 8-1404. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

Language similar to that used in K.S.A. 8-1541(b) has been construed by the Kansas Supreme Court. In *Robbins v. City of Wichita*, 285 Kan. 455, 172 P.3d 1187 (2007), the Supreme Court held that the “due care” required of a police officer driving an authorized emergency vehicle pursuant to K.S.A. 8-1506(d) applies not only to the officer’s physical operation of the vehicle, but also to the decision to chase or continue to chase a law violator. The court went on to state that the standard of care for evaluating whether the driver of an emergency vehicle breached the statutory duty to drive with due regard for the safety of others is “reckless disregard.” The Supreme Court further cited with approval the definition found in PIK 3d 70.04, Reckless Driving [now PIK 4th 66.060].

121.42**PEDESTRIANS—DRAWBRIDGE—RAILROAD CROSSINGS****A. Drawbridge**

No pedestrian shall enter or remain upon any drawbridge or approach beyond the bridge signal, gate or barrier after a bridge operation signal indication has been given.

B. Railroad Crossings

No pedestrian shall pass through, around, over or under any crossing gate or barrier at a railroad grade crossing (or bridge) while the gate or barrier is closed or is being opened or closed.

Notes on Use

For authority, see K.S.A. 8-1544. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.43

BLIND PEDESTRIANS—DUTY OF DRIVERS

The driver of a vehicle shall yield the right of way to any blind pedestrian carrying a clearly visible white cane or accompanied by a guide dog.

Notes on Use

For authority, see K.S.A. 8-1542. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

IX. SPECIAL STOPS REQUIRED

121.44

OBEDIENCE TO SIGNAL OF TRAIN

A. Stopping for Railroad Crossing

When a person driving a vehicle approaches a railroad grade crossing and

(a clearly visible electrical or mechanical signal device gives warning of the immediate approach of a railroad train or other on-track equipment)

(a crossing gate is lowered or a flagman signals the approach of a train or other on-track equipment)

(a railroad train or other on-track equipment approaching within approximately 1,500 feet of the highway crossing emits a signal audible from that distance and the train is an immediate hazard)

(an approaching railroad train or other on-track equipment is plainly visible and is in hazardous proximity to the crossing)

the driver of the vehicle shall stop within 50 but not less than 15 feet from the nearest rail and shall not proceed until the driver can do so safely.

B. Obedience to Gate or Barrier

No person shall drive a vehicle through, around, or under any crossing gate or barrier at a railroad crossing while the gate or barrier is closed or is being opened or closed.

Notes on Use

For authority, see K.S.A. 8-1551. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

In *Garrison v. Hamil*, 176 Kan. 548, 271 P.2d 307 (1954), the mechanical failure of a railroad signal device was held to form no basis for an action for damages where a third party disregarded the signal and drove into the stopped vehicle.

121.45**CERTAIN VEHICLES TO STOP AT ALL RAILROAD CROSSINGS**

The driver of _____, before crossing any track or tracks of a railroad, shall stop the vehicle within 50 feet but not less than 15 feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, and shall not proceed until *(he) (she)* can do so safely. After stopping and upon proceeding when it is safe to do so, the driver of the vehicle shall cross only in a gear of the vehicle that there will be no necessity for manually changing gears while traversing the crossing and the driver shall not manually shift gears while crossing the track or tracks.

Notes on Use

For authority, see K.S.A. 8-1553. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. The regulations as promulgated by the Secretary of Transportation should be obtained to insert the vehicle in the blank in line one of the instruction. In addition the provisions of K.S.A. 8-1553(b) except certain crossings from the regulations.

Comment

The rules relating to the right of way of trains at railroad crossings were considered in *Williams v. Union Pacific Railroad Co.*, 204 Kan. 772, 205 Kan. 61, 465 P.2d 975 (1970), wherein a gasoline transport truck failed to stop at a railroad crossing in an industrial area of a city.

X. STOPPING, STANDING, AND PARKING**121.46****STOP AND YIELD WHEN EMERGING FROM
ALLEY, DRIVE OR BUILDING**

The driver of a vehicle within a business or residence district emerging from an alley, building, private road or driveway shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across such alley, building entrance, road or driveway, or in the event there is no sidewalk area, shall stop at the point nearest the street to be entered where the driver has a view of approaching traffic thereon.

Notes on Use

For authority, see K.S.A. 8-1555. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. Reference should be made to the provisions of K.S.A. 8-1402 to 8-1485 for definitions of several of the words or phrases included in the instruction.

121.47

DRIVING UPON SIDEWALK

No person shall drive any vehicle upon a sidewalk or sidewalk area except upon a permanent or duly authorized temporary driveway.

Notes on Use

For authority, see K.S.A. 8-1575. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. Reference should be made to the provisions of K.S.A. 8-1402 to 8-1485 for definitions of several of the words or phrases included in the instruction and to PIK 4th 121.61, Traffic Laws Apply to Bicycles, Motorcycles, Animals, or Animal-Drawn Vehicles.

121.48

STOPPING OR PARKING ON TRAVELED ROADWAY**A. Prohibited Stopping, Standing, or Parking on Roadway**

Upon any roadway outside a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the roadway when it is practicable to stop, park or so leave the vehicle off the roadway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of the stopped vehicle shall be available from a distance of 200 feet in each direction upon the highway.

B. Exception if Vehicle Disabled

The above provisions shall not apply to any vehicle which is disabled in a manner and to the extent that it is impossible to avoid stopping and temporarily leaving the vehicle in that position.

Notes on Use

For authority, see K.S.A. 8-1569. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. Include part B when the facts raise the question of whether a vehicle was disabled so that it was impossible to avoid stopping on a roadway.

The statutory prohibition against parking on a highway is inapplicable to a motorist waiting to make a left turn. *Jones v. Spencer*, 220 Kan. 445, 553 P.2d 300 (1976).

Comment

Defendant was held to be negligent in parking on the highway in *State Farm Mutual Automobile Ins. Co. v. Cromwell*, 187 Kan. 573, 358 P.2d 761 (1961).

In a personal injury action in which an automobile in which the plaintiff was a passenger collided with the rear of a semi-trailer truck improperly parked, it was held the stop was not a compelled stop and the driver's improper parking constituted negligence. *Applegate v. Home Oil Co.*, 182 Kan. 655, 324 P.2d 203 (1958).

K.S.A. 8-570 [antecedent of K.S.A. 8-1569] was discussed, and a violation of it was held to constitute negligence, in *McElhaney v. Rouse*, 197 Kan. 136, 141, 142, 415 P.2d 241 (1966).

In *Lutz v. Peine*, 209 Kan. 559, 498 P.2d 60 (1972), the defendant drove into the rear of a parked pickup in which plaintiff was asleep. The court held that plaintiff was free of contributory negligence as a matter of law in that the record disclosed no evidence that plaintiff violated any duty or law as to the manner in which the truck was parked.

The provisions of K.S.A. 8-570(a) [antecedent of K.S.A. 8-1569] have no application to an automobile that is involuntarily stopped on a highway contrary to the will of the driver. *Fairbanks v. Hodschayan*, 212 Kan. 545, 512 P.2d 1042 (1973).

121.49**STOPPING, STANDING, OR PARKING PROHIBITED****A. Prohibited Stopping or Parking**

Except when necessary to avoid conflict with other traffic or in compliance with traffic rules or the directions of an officer or traffic-control device, no person shall stop, stand or park a vehicle _____ (*insert appropriate phrase from below*).

- on the roadway side of any vehicle stopped or parked at the edge or curb of a street
- on a sidewalk
- within an intersection
- on a crosswalk
- between a safety zone and the adjacent curb or within thirty (30) feet of points on the curb immediately opposite the ends of a safety zone, unless the proper traffic authority indicates a different length by signs or markings
- alongside or opposite any street excavation or obstruction when stopping, standing or parking would obstruct traffic
- upon any bridge or other elevated structure upon a highway or within a highway tunnel
- on any railroad tracks
- at any place where official signs prohibit stopping

B. Exceptions to Pick Up or Discharge Passengers

No person shall stand or park a vehicle except momentarily to pick up or discharge a passenger _____ (*insert appropriate phrase from below*).

- in front of a public or private driveway
- within fifteen (15) feet of a fire hydrant
- within twenty (20) feet of a crosswalk at an intersection
- within thirty (30) feet upon the approach to any flashing signal, stop sign or traffic-control signal located at the side of a roadway
- at any place where official signs prohibit standing

C. Exceptions to Load or Unload

No person shall park a vehicle, whether occupied or not, within 50 feet of the nearest rail of a railroad crossing or at any place where official signs prohibit parking, except temporarily for the purpose of, and while engaged in, loading or unloading merchandise or passengers.

Notes on Use

For authority, see K.S.A. 8-1571. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Under K.S.A. 8-1571 the following parenthetical expressions may become applicable under part A:

(on any controlled-access highway.)

(in the area between roadways of a divided highway, including crossovers.)

The applicable parenthetical reference should be included.

121.50

STOPPING OR PARKING ON ROADWAYS

A. Parking upon Two-way Roadways

Every vehicle stopped or parked upon a two-way roadway shall be so stopped or parked with the right-hand wheels parallel to and within 12 inches of the right-hand curb or as close as practicable to the right edge of the right-hand shoulder.

B. Parking upon One-way Roadways

Every vehicle stopped or parked upon a one-way roadway shall be so stopped or parked parallel to the curb or edge of the roadway, in the direction of authorized traffic movement, with its right-hand wheels within 12 inches of the right-hand curb or as close as practicable to the right edge of the right-hand shoulder, or with its left-hand wheels within 12 inches of the left-hand curb or as close as practicable to the left edge of the left-hand shoulder.

Notes on Use

For authority, see K.S.A. 8-1572. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. The statute authorizes local authorities by ordinance to permit angle parking, provided they obtain permission from the Secretary of Transportation if federal-aid or state highways are involved. The statute further permits the Secretary of Transportation to place signs prohibiting or restricting the stopping, standing or parking of vehicles upon highways.

121.51**UNATTENDED MOTOR VEHICLE**

No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key and effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway.

Unattended shall not include a motor vehicle with an engine that has been activated by a remote starter system, when the motor vehicle is locked and the ignition keys are not in the motor vehicle.

Notes on Use

For authority, see K.S.A. 8-1573. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

In *Lamb v. State*, 33 Kan. App. 2d 843, 109 P.3d 1265 (2005), the court discussed K.S.A. 8-1573 and the “public duty doctrine.”

121.52

**MEETING OR OVERTAKING SCHOOL, CHURCH
OR DAYCARE BUS**

The driver of a vehicle meeting or overtaking from either direction any school, church or daycare bus stopped on the highway shall stop before reaching the bus when there is in operation on the bus flashing red lights. The driver shall not proceed until *(the school bus resumes motion or the flashing red lights and the stop signal arm are no longer operating) (the church bus or daycare bus resumes motion or the driver is signaled by the church bus or daycare bus driver to proceed or the flashing red lights and stop signal arm, if any, are no longer operating).*

Notes on Use

For authority, see K.S.A. 8-1556 and 8-1556a. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. The requirements of the flashing red lights to be displayed on a bus are set forth in K.S.A. 8-1730. For definitions of “church bus” and “day care program bus,” see K.S.A. 8-1730a.

XI. LIGHTING EQUIPMENT

121.53

WHEN LIGHTS ARE REQUIRED

Every vehicle upon a highway shall display lighted head and other lamps and illuminating devices *(at any time from sunset to sunrise) (when persons and vehicles on the highway are not clearly discernible at a distance of 1,000 feet ahead) (when windshield wipers are in continuous use as a result of rain, sleet, or snow).*

[Motorcycles, motor-driven cycles and motorized bicycles manufactured after January 1, 1978, and operated on any highway must display lighted head and tail lights at all times.]

Notes on Use

For authority, see K.S.A. 8-1703. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. See K.S.A. 8-1704(a), providing that the provisions as to the visibility of objects apply during the stated time “... upon a straight, level, unlighted highway under normal atmospheric conditions ...” unless otherwise specified.

See K.S.A. 8-1704(b) for mounting height of lamps or devices. See PIK 4th 121.60, Display of Warning Devices When Certain Vehicles are Stopped or Disabled.

Lighting Equipment. The lighting equipment and related provisions of the motor vehicle laws cover several sections and, in the opinion of the Committee, the following subject and statutory title references will serve as a sufficient guide to enable the judge or attorney to supplement the suggested instructions with specific provisions for different classes of vehicles.

Subject	K.S.A.
Head Lamps on Motor Vehicles	8-1705
Tail Lamps	8-1706
Red Reflectors	8-1707
Stop Lamps	8-1708(a)
Electric Turn Signals	8-1708(b)
Buses, Trucks, Motor Homes, and Motor Vehicles Equipped With Mounted Truck-camper—Clearance Lamps, Side Marker Lamps, and Reflectors	8-1710(a)
Trailers and Semitrailers 80 inches or More in Overall Width—Clearance Lamps, Side Marker Lamps and Reflectors	8-1710(b)

Subject	K.S.A.
Trailers and semitrailers—reflectors	8-1710(c)
Truck-tractor—Cab Clearance and Identification Lamps	8-1710(d)
Trailers, Semitrailers and Pole Trailers 30 feet or more in Overall Length—Marker Lamps and Reflectors	8-1710(e)
Pole Trailers—Marker Lamps and Reflectors	8-1710(f)
Identification Lamps	8-1710(g)
Boat Trailers 80 Inches or More in Overall Width—Clearance Lamps, Side Marker Lamps and Reflectors	8-1710(h)
Color of Front and Rear Clearance Lamps, Identification Lamps, Marker Lamps and Reflectors	8-1711
Mounting of Reflectors	8-1712(a)
Mounting of Clearance Lamps	8-1712(b)
Size and Visibility of Reflectors	8-1713(a)
Visibility of Front and Rear Clearance and Identification Lamps	8-1713(b)
Visibility of Side Marker Lamps	8-1713(c)
Vehicle Combinations—Obstructed Lights	8-1714
Projecting Loads—Lamps or Flags Required	8-1715
Parked Vehicles (See PIK 4 th 121.54)	8-1716
Farm Tractors Sold After 1975—Vehicular Hazard Warning Lights, Lamps and Reflectors	8-1717(a), (b)
Combination of Farm Tractor and Towed Farm Equipment—Lamps and Reflectors	8-1717(c), (d)
Slow Moving Vehicles—Emblems	8-1717(e)-(i)
Lamps on Animal-drawn and Other Vehicles	8-1718
Spot Lamps	8-1719(a)
Fog Lamps	8-1719(b)
Auxiliary Passing Lamps	8-1719(c)
Auxiliary Driving Lamps	8-1719(d)
Emergency Vehicle Lamps	8-1720
Stop Lamp Requirements	8-1721(a)
Turn Signal Requirements	8-1721(b)
Additional Lighting Equipment	8-1722, 8-1723
Multiple-beam Lighting Equipment—Distribution and Intensity of Light	8-1724, 8-1725
Single-beam Lighting Equipment	8-1726
Alternate Lighting Equipment—Speed Limited	8-1727

Subject	K.S.A.
Number of Required or Permitted Lamps	8-1728
Special Restrictions on Intensity of Lamps	8-1729(a)
Red Light Visible From Front—Prohibited—Exceptions	8-1729(b)
Flashing Lights Prohibited—Exceptions	8-1729(c), (d)
Lighting Devices and Reflectors on Rear—Color	8-1729(e)
School Bus—Signal Lamps	8-1730
Highway Construction and Maintenance Vehicles	8-1731
Certain Vehicles to Carry Flares and Warning Devices	8-1744
Display of Warning Devices When Certain Vehicles Are Stopped or Disabled	8-1745

Comment

Whether lighting equipment conforms to K.S.A. 8-592(b) [antecedent of K.S.A. 8-1725] and whether improper lighting equipment was a proximate cause of the accident in question were held to be questions for the trier of fact in *Newman v. Case*, 196 Kan. 689, 413 P.2d 1013 (1966).

The case of *Carlson v. Ferguson*, 270 Kan. 576, 17 P.3d 333 (2001), discusses the lighting requirements for the rear of fertilizer nurse tanks being towed during daylight hours.

121.54

LAMPS ON PARKED VEHICLES

Whenever a vehicle is parked or stopped upon a roadway or shoulder adjacent thereto, whether attended or unattended, during the hours between a half hour after sunset and a half hour before sunrise, and there is insufficient light to reveal any person or object upon the highway within a distance of 1,000 feet, the vehicle so parked or stopped shall display a white or amber light visible for a distance of 1,000 feet to the front of the vehicle, and a red light visible for a distance of 1,000 feet to the rear of the vehicle.

Notes on Use

For authority, see K.S.A. 8-1716. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

XII. BRAKES

121.55

BRAKE PERFORMANCE REQUIREMENTS

A. Service Brakes, Performance

Every motor vehicle and every combination of vehicles shall have a service braking system that will stop the vehicle or combination of vehicles within forty (40) feet from an initial speed of twenty (20) miles per hour on a level, dry, smooth, hard surface.

B. Parking Brakes, Performance

Every motor vehicle and combination of vehicles shall have a parking brake system adequate to hold the vehicle or combination of vehicles on any grade on which it is operated, under all conditions of loading, on a surface free from snow, ice or loose material.

Notes on Use

For authority, see K.S.A. 8-1734. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. The instruction does not apply to “antique cars” (K.S.A. 8-1734[d]) registered pursuant to K.S.A. 8-166 *et seq.* and any amendments thereto.

The Secretary of Transportation is authorized to require additional braking systems when necessary for the safe operation of any vehicle or class of vehicles. K.S.A. 8-1734(c).

XIII. MISCELLANEOUS VEHICLE EQUIPMENT**121.56****HORNS AND WARNING DEVICES**

Every motor vehicle, when operated upon a highway, shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet, and when reasonably necessary to insure safe operation the driver of the vehicle shall give audible warning with *(his) (her)* horn.

Notes on Use

For authority, see K.S.A. 8-1738(a). See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

In *Jarboe v. Pine*, 189 Kan. 44, 366 P.2d 783 (1961), it was held that whether it was necessary for the driver to sound his horn to insure safe operation of his vehicle was a question of fact for the jury. The application of statutory requirements in automobile negligence actions is discussed in *Hubbard v. Allen*, 168 Kan. 695, 215 P.2d 647 (1950) and *Green v. Higbee*, 176 Kan. 596, 272 P.2d 1084 (1954).

121.57**MIRRORS****A. Left Side Mirror**

Every motor vehicle shall be equipped with a mirror mounted on the left side of the vehicle and so located as to reflect to the driver a view of the highway to the rear.

B. Center Inside or Right Side Mirror

Every motor vehicle, except a motorcycle, shall be equipped with an additional mirror mounted either inside the vehicle approximately in the center or outside the vehicle on the right side and so located as to reflect to the driver a view of the highway to the rear.

C. Mirror Maintenance

All required mirrors shall be maintained in good condition.

Notes on Use

For authority, see K.S.A. 8-1740. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. Under part C, the statute refers to all mirrors required by regulations of the United States Department of Transportation.

121.58

WINDSHIELDS AND WINDOWS

A. Must be Unobstructed

No person shall drive any motor vehicle with any sign, poster or other nontransparent material upon the front windshield, side wings or side or rear windows or with a damaged front windshield or side or rear windows of the vehicle which substantially obstructs the driver's clear view of the highway or any intersecting highway.

B. Windshield to be Equipped with Wipers

The windshield on every motor vehicle shall be equipped with a device for cleaning rain, snow or other moisture from the windshield.

C. Windshield Wiper Maintenance

Every windshield wiper upon a motor vehicle shall be maintained in good working order.

Notes on Use

For authority, see K.S.A. 8-1741. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

For cases involving one-way glass or sun screening devices, see K.S.A. 8-1749a and 8-1749b.

121.59

DEFECTIVE TIRES

No person shall operate a motor vehicle having one or more tires in unsafe condition. A tire is in an unsafe condition if _____ (*include here the unsafe condition which is supported by the evidence*).

Notes on Use

K.S.A. 8-1742 and 8-1742b set forth a variety of tire conditions deemed to be unsafe and prohibited by law. The instruction should state the specific unsafe condition supported by evidence in the case.

121.60

**DISPLAY OF WARNING DEVICES WHEN CERTAIN VEHICLES
ARE STOPPED OR DISABLED****A. Stop of Less Than Ten Minutes**

Whenever any *(truck) (bus) (truck-tractor) (trailer) (semi-trailer) (pole trailer)* 80 inches or more in overall width or 30 feet or more in overall length is stopped upon a roadway or adjacent shoulder, the driver shall immediately actuate vehicular hazard warning signal lamps as follows:

1. Lamps to the front of the vehicle shall be mounted at the same level and as widely spaced laterally as practicable, and shall display simultaneously flashing amber light. (On any vehicle manufactured prior to January 1, 1969, the lamps showing to the front may display simultaneously flashing white and amber lights, or any shade of color between white and amber.)

2. Lamps displaying the warning to the rear shall be mounted at the same level and as widely spaced laterally as practicable, and shall show simultaneously flashing amber or red lights, or any shade of color between amber and red.

3. The warning lights shall be visible from a distance of not less than 500 feet in normal sunlight.

[The vehicular hazard warning signal lamps need not be displayed by a vehicle *(parked lawfully in an urban district) (stopped lawfully to receive or discharge passengers) (stopped to avoid conflict with other traffic) (stopped to comply with an official traffic-control device) (when warning devices for a disabled truck are in place).*]

B. Disabled or Stopped for More Than Ten Minutes

Whenever any *(truck) (bus) (truck-tractor) (trailer) (semi-trailer) (pole trailer)* 80 inches or more in overall width or 30 feet or more in overall length is *(disabled) (stopped for more than ten minutes)* upon a roadway outside an urban district at any time when there is insufficient light to reveal persons and vehicles within a distance of 1,000 feet, the driver of the vehicle shall display the following warning devices:

1. A lighted fusee, a lighted red electric lantern or a portable red emergency reflector shall immediately be placed at the traffic side of the vehicle in the direction of the nearest approaching traffic.

2. As soon thereafter as possible but in any event within the burning period of the fusee, the driver shall place three liquid-burning flares, or

three red electric lanterns, or three portable red emergency reflectors on the roadway in the following order:

(a) One approximately 100 feet from the disabled vehicle in the center of the lane occupied by the vehicle and toward traffic approaching in that lane.

(b) One approximately 100 feet in the opposite direction from the disabled vehicle and in the center of the traffic lane occupied by the vehicle.

(c) One at the traffic side of the disabled vehicle not less than 10 feet rearward or forward in the direction of the nearest approaching traffic. If a lighted red electric lantern or red portable emergency reflector has been placed at the traffic side of the vehicle, it may be used for this purpose.

C. Same; Within 500 feet of a Curve, Hillcrest or Obstruction

Whenever any (truck) (bus) (truck-tractor) (trailer) (semi-trailer) (pole trailer) 80 inches or more in overall width or 30 feet or more in overall length is (disabled) (stopped for more than ten minutes) within 500 feet of a curve, hillcrest, or other obstruction to view, the warning device in that direction shall be so placed as to afford ample warning to other users of the highway, but in no case less than 100 feet nor more than 500 feet from the disabled vehicle.

Notes on Use

For authority, see K.S.A. 8-1745. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. The applicable parenthetical references should be included. Under part A the requirements of vehicular hazard warning signal lamps under K.S.A. 8-1722 have been included in the instruction. Under part B the requirements of K.S.A. 8-1745(f) as to when warning devices are to be displayed have been included.

See subsection (d) of K.S.A. 8-1745 for placing of warning on a divided highway.

See subsection (e) of K.S.A. 8-1745 for restrictions if the vehicle is used for transportation of explosives or flammable gas.

See subsection (g) of K.S.A. 8-1745 for requirement of red flags if vehicle is disabled or stopped for more than ten minutes during daylight.

See subsection (h) of K.S.A. 8-1745 for placing of warning devices when vehicle is stopped entirely off the roadway and on an adjacent shoulder.

See K.S.A. 8-1744 for the requirements of the warning devices to be displayed.

Comment

In *Abston v. Medora Grain, Inc.*, 206 Kan. 727, 482 P.2d 692 (1971), the defendant's employees failed to display warning devices as required by statute for a tractor-trailer combination truck that was stalled and blocking an intersection at night. The court held that the evidence was sufficient to support a verdict for plaintiff and that the failure was the cause of plaintiff's damages in ensuing motor vehicle accident.

XIV. MISCELLANEOUS PROVISIONS**121.61****TRAFFIC LAWS APPLY TO BICYCLES, MOTORCYCLES,
ANIMALS, OR ANIMAL-DRAWN VEHICLES**

Every person (*riding [a bicycle] [a motorcycle] [an animal]*) (*driving any animal-drawn vehicle*) upon a roadway shall be subject to the provisions applicable to the driver of a vehicle, except those provisions which by their nature can have no application.

A person (*riding [a bicycle] [a motorcycle] [an animal]*) (*driving any animal-drawn vehicle*) has the same obligations and is entitled to the same protection under the law as other persons in vehicles upon the highway.

Notes on Use

For authority, see K.S.A. 8-1593, which provides that traffic laws apply to persons operating motorcycles, K.S.A. 8-1504, which provides that traffic laws apply to persons riding an animal or driving any animal-drawn vehicle upon a road, and K.S.A. 8-1587, which provides that traffic laws apply to persons riding bicycles. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

Comment

It was held in *Morrison v. Hawkeye Casualty Co.*, 168 Kan. 303, 212 P.2d 633 (1949) that persons riding bicycles have the same rights and are entitled to the same protection as persons in vehicles upon the highway.

In *Conrad v. Dillinger*, 176 Kan. 296, 270 P.2d 216 (1954), the Kansas Supreme Court held that “vehicle” is sufficiently broad to cover a ridden animal. In this case it was also held that a person riding an animal upon a highway is subject to the Vehicle Laws applicable to a vehicle driver and consequently horses must have tail lights if ridden at night.

The court in *Kendrick v. Manda*, 38 Kan. App. 2d 864, 174 P.3d 432 (2008), clarified that a bicycle is not defined as a vehicle for purposes of the Rules of the Road in Kansas, nor is a bicyclist defined as a pedestrian. However, if a bicyclist operates a bicycle on a roadway, the bicyclist has the same rights and duties applicable to drivers of vehicles. Likewise, if a bicyclist uses a sidewalk, the bicyclist has the same rights as a pedestrian and is not subject to vehicular traffic laws. See also *Schallenberger v. Rudd*, 244 Kan. 230, 235, 767 P.2d 841 (1989).

121.62

OBSTRUCTION TO DRIVER'S VIEW

[No person shall drive a vehicle when it is so loaded (or when there are in the front seat such number of persons, exceeding three) as to obstruct the view of the driver to the front or sides of the vehicle or as to interfere with the driver's control over the driving mechanism of the vehicle.]

[No passenger shall ride in such position as to interfere with the driver's view ahead or to the sides or to interfere with the driver's control over the driving mechanism of the vehicle.]

Notes on Use

For authority, see K.S.A. 8-1576. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. Use one or both paragraphs of the instruction, depending on the facts of the case.

121.63

FOLLOWING FIRE APPARATUS OR CROSSING HOSE

No person shall follow any fire apparatus traveling in response to a fire alarm closer than 500 feet *(or stop a vehicle within 500 feet of any fire apparatus stopped in answer to a fire alarm)* (or drive a vehicle over any unprotected fire hose without the consent of the official in charge).

Notes on Use

For authority, see K.S.A. 8-1581 and 8-1582. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.64**PUTTING INJURIOUS MATERIALS ON HIGHWAY**

No person shall throw or deposit upon any highway any *(glass) (nails) (tacks) (wire) (cans) (other substance)* likely to injure any person, animal, or vehicle upon such highway.

Notes on Use

For authority, see K.S.A. 8-1583. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. K.S.A. 8-1583(b) requires a person to remove any destructive or injurious materials he drops or permits to be dropped on the highway. Subsection (c) requires any person removing a damaged vehicle from a highway to remove any glass or injurious substance dropped upon the highway from the vehicle.

121.65

PROJECTING LOADS ON PASSENGER VEHICLES

No passenger-type vehicle shall be operated on the highway with any load, extending beyond the left side of the vehicle or extending more than six inches beyond the right side.

Notes on Use

For authority, see K.S.A. 8-1903. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.66

WIDTH, HEIGHT, LENGTH, AND WEIGHT OF VEHICLES

Notes on Use

For specific statutory provisions, see the following:

K.S.A. 8-1902	Width of Vehicles
K.S.A. 8-1904	Height and Length of Vehicles
K.S.A. 8-1905 and 8-1906	Wheel and Axle Loads
K.S.A. 8-1908 to 8-1913	Gross Weight and Loads

121.67

**DUTIES AND LIABILITIES DURING REPAIR OR
IMPROVEMENT OF HIGHWAYS**

No person shall *(fail) (neglect) (refuse)* to comply with restrictions or traffic regulations in a road construction zone or fail to comply with traffic orders or traffic directions by a flagman in a road construction zone.

Notes on Use

For authority, see K.S.A. 8-1531a.

“Road construction zone,” defined in K.S.A. 8-1458a, means the portions of a highway which are identified by posted or moving signs as being a construction or maintenance work area. The zone starts at the first sign identifying the zone and continues until a posted or moving sign indicates that the construction zone has ended.

Comment

See also K.S.A. 68-2101- 68-2107.

121.68**RIGHT OF WAY DURING REPAIR OR IMPROVEMENT OF HIGHWAYS**

A. The driver of a vehicle shall yield the right of way to any authorized vehicle or pedestrian actually engaged in work upon a road construction zone indicated by traffic control devices.

A road construction zone means the portion of a highway which is identified by posted or moving signs as being a construction or maintenance work area. The zone starts at the first sign identifying the zone and continues until a posted or moving sign indicates that the road construction zone has ended.

B. The driver of a vehicle shall yield the right of way to any authorized construction vehicle actually engaged in work upon a highway whenever such vehicle displays flashing lights.

Notes on Use

For authority, see K.S.A. 8-1531(a) and (b).

Comment

In *Sterba v. Jay*, 249 Kan. 270, 816 P.2d 379 (1991), K.S.A. 8-1531(a) and (b) are discussed and distinguished. It was held to be error for the trial court to fail to instruct on the duty imposed by K.S.A. 8-1531(a).

K.S.A. 68-2101 through 68-2107 set forth certain duties and liabilities of contractors and municipalities during the repair or improvement of highways, roads, streets and alleys. These statutes require barricades, warning signs, warning lights and speed restrictions.

121.69**OPERATION OF MOTORCYCLES****A. Seat Occupancy and Passengers**

A person operating a motorcycle shall ride only upon the permanent and regular seat, and the operator shall not carry any other person nor shall any other person ride on a motorcycle unless the motorcycle is designed to carry more than one person, in which event a passenger may ride upon the permanent and regular seat if designed for two persons, or upon another seat firmly attached to the motorcycle at the rear or side of the operator.

B. Manner of Riding

A person shall ride upon a motorcycle only while sitting astride the seat, facing forward, with one leg on each side of the motorcycle.

C. Carrying of Packages

No person shall operate a motorcycle while carrying any package, bundle, or other article which prevents *(him)* *(her)* from keeping both hands on the handlebars.

D. Operation and Control

The operator of a motorcycle shall not carry any person, nor shall any person ride, in a position that will interfere with the operation or control of the motorcycle or the view of the operator.

Notes on Use

For authority, see K.S.A. 8-1594. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. Under K.S.A. 8-1594, paragraph B of this instruction does not apply to an autocycle. See K.S.A. 8-1497 for the definition of autocycle.

121.70**OPERATION OF MOTORCYCLES—ROADWAYS
LANED FOR TRAFFIC****A. Full use of a Traffic Lane**

All motorcycles are entitled to full use of a lane and a motor vehicle shall not be driven in such a manner as to deprive any motorcycle of the full use of a lane. (This section shall not apply to motorcycles operated two abreast in a single lane.)

B. Passing in the Same Lane

The operator of a motorcycle shall not overtake and pass in the same lane occupied by the vehicle being overtaken.

C. Passing Between Lanes

A person shall not operate a motorcycle between lanes of traffic or between adjacent lines or rows of vehicles.

D. Number of Motorcycles in Same Lane

Motorcycles shall not be operated more than two abreast in a single lane.

Notes on Use

For authority, see K.S.A. 8-1595. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. The parenthetical reference in part A should be included only when the evidence warrants its submission.

121.71

**OPERATION OF MOTORCYCLES—CLINGING
TO OTHER VEHICLES**

A person riding upon a motorcycle shall not attach *(himself) (herself)* or the motorcycle to any other vehicle on a roadway.

Notes on Use

For authority, see K.S.A. 8-1596. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.72

MOTORCYCLES—EQUIPMENT

(The statutory provisions relative to motorcycle equipment are so diverse that an instruction is not practical.)

Notes on Use

For specific statutory provisions, see the following:

K.S.A. 8-1597(a)	Seat and Footrests Required for Passengers
K.S.A. 8-1597(b)	Handlebar Height
K.S.A. 8-1801	Head Lamp
K.S.A. 8-1802	Tail Lamp
K.S.A. 8-1803	Rear Red Reflector
K.S.A. 8-1804	Stop Lamps and Electric Turn Signals
K.S.A. 8-1805 and 8-1806	Lighting Equipment
K.S.A. 8-1807, 8-1808 and 8-1809	Brakes
K.S.A. 8-1810	Horns, Mufflers, Mirrors, and Tires

121.73

MOTORCYCLES—EQUIPMENT OF OPERATOR OR RIDER**A. Protective Headgear in General**

No person less than 18 years old shall operate or ride upon a motorcycle unless wearing a helmet which complies with minimum performance requirements. The applicable minimum performance requirements for protective headgear are:

(... set out the applicable standards ...)

B. Allowing Person Less than 18 Years Old to Ride or Operate Without Protective Headgear

No person shall allow any person less than 18 years old to operate a motorcycle or motorized bicycle or to ride as a passenger without wearing a helmet. The helmet worn must comply with the following minimum performance requirements:

(... set out the applicable standards ...)

C. Eye-Protective Device in General

No person shall operate a motorcycle unless:

- 1. the person is wearing an eye-protective device, which shall consist of protective glasses, goggles, or transparent face shields which are shatterproof and impact resistant; or**
- 2. the motorcycle is equipped with a wind-screen, which has a minimum height of 10” measured from the center point of the handlebars.**

D. Eye-protective Device for Passenger Less than 18 Years Old

No person less than 18 years old shall ride as a passenger on a motorcycle unless the person is wearing an eye-protective device, which shall consist of protective glasses, goggles, or transparent face shields which are shatterproof and impact resistant.

Notes on Use

For authority, see K.S.A. 8-1598. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use. The statute does not apply to persons riding within an enclosed cab, autocycle, or golf cart. Neither does it apply to any person operating or riding any industrial or cargo-type vehicle having three wheels and commonly known as a truckster. The minimum guidelines are

established by the highway traffic safety administration pursuant to the national traffic and motor vehicle safety act of 1966 for helmets designed for use by motorcyclists and other motor vehicle users and should be inserted in the instruction. Parts B and D apply only in cases arising on and after July 1, 2011.

121.74**OPERATION OF BICYCLES AND PLAY VEHICLES****A. Manner of Riding**

A person propelling a bicycle shall not ride other than upon or astride a permanent and regular seat attached thereto.

B. Passengers

A bicycle shall not be used to carry more persons at one time than the number for which it is designed and equipped.

C. Carrying of Articles

A person operating a bicycle shall not carry any package, bundle or article which prevents the driver from keeping at least one hand upon the handlebars.

D. Clinging to Vehicles

A person riding upon any bicycle, coaster, roller skates, sled or toy vehicle shall not attach the same or *(himself) (herself)* to any vehicle upon a roadway.

Notes on Use

For authority, see: part A, K.S.A. 8-1588(a); part B, K.S.A. 8-1588(b); part C, K.S.A. 8-1591 and part D, K.S.A. 8-1589. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

The provisions of K.S.A. 8-1586 through 8-1592 also are applicable to motorized bicycles. See K.S.A. 8-1592a.

121.75**OPERATION OF BICYCLES AND MOPEDS—
ROADWAYS AND BICYCLE PATHS****A. Ride to Right Side of Roadways**

Every person operating a bicycle or moped upon a roadway at less than the normal speed of traffic at the time and place and under the conditions then existing shall ride as near to the right side of the roadway as practicable except under any of the following situations when:

1. overtaking and passing another bicycle or vehicle proceeding in the same direction;
2. preparing for a left turn at an intersection or into a private road or driveway;
3. reasonably necessary to avoid conditions including, but not limited to, fixed or moving objects, parked or moving bicycles, bicycles, pedestrians, animals, surface hazards or narrow width lanes that make it unsafe to continue along the right-hand edge of the roadway. “Narrow width lane” means a lane that is too narrow for a bicycle and a vehicle to travel safely side-by-side within the lane.

B. Ride to Left Side of Roadway

Any person operating a bicycle or a moped upon a one-way highway with two or more marked traffic lanes may ride as near to the left side of the roadway as practicable.

C. Number Riding Abreast

Persons riding bicycles upon a roadway shall not ride more than two abreast except on paths or parts of roadways set aside for the exclusive use of bicycles.

D. Ride on Paths Adjacent to Roadways

Wherever a usable path for bicycles has been provided adjacent to a roadway, bicycle riders shall use such path and shall not use the roadway.

Notes on Use

For authority, see K.S.A. 8-1590. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

The provisions of K.S.A. 8-1586 through 8-1592 also are applicable to motorized bicycles. See K.S.A. 8-1592a.

Comment

In *Schallenberger v. Rudd*, 244 Kan. 230, 767 P.2d 841 (1989) it was held that sidewalks do not qualify as a “usable path” under K.S.A. 8-1590(c) [now 8-1590(d)] so as to make mandatory their use by bicyclists. A bicyclist may legally use the sidewalks, and, if the bicyclist was using the sidewalks, she had the right of way in using the crosswalk.

121.76**BICYCLES—EQUIPMENT****A. Front Lamps**

Every bicycle used between sunset and sunrise shall be equipped with a lamp on the front which emits a white light visible from a distance of at least 500 feet to the front.

B. Rear Lamps and Reflectors

Every bicycle used between sunset and sunrise shall be (1) equipped with a red reflector on the rear which is visible from all distances from 100 feet to 600 feet to the rear when directly in front of lawful lower-beams of head lamps on a motor vehicle, (2) equipped with a lamp emitting a red light visible from a distance of 500 feet to the rear, or (3) operated by a person wearing a device that emits a red or amber light that is visible from a distance of 500 feet to the rear.

C. Brakes

Every bicycle shall be equipped with a brake which will enable the operator to make the braked wheels skid on dry, level, and clean pavement.

Notes on Use

For authority, see K.S.A. 8-1592. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

The provisions of K.S.A. 8-1586 through 8-1592 also are applicable to motorized bicycles. See K.S.A. 8-1592a.

See K.S.A. 8-1724 for the requirements of lawful lower-beams of headlamps on a motor vehicle.

Comment

K.S.A. 8-1592(c) provides that no person shall sell a new bicycle or pedal for use on a bicycle that is not equipped with a reflector on each pedal of the bicycle which is visible from the front and rear of the bicycle during darkness from a distance of 200 feet.

121.77

OPENING CAR DOOR TO MOVING TRAFFIC

No person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, and can be done without interfering with the movement of other traffic, nor shall any person leave a door open on the side of a vehicle available to moving traffic for a period of time longer than necessary to load or unload passengers.

Notes on Use

For authority, see K.S.A. 8-1577. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

121.78**OCCUPANCY OF HOUSE TRAILER, MANUFACTURED HOME
OR MOBILE HOME ON HIGHWAY**

No person shall occupy a house trailer, manufactured home or mobile home while it is being moved upon a public highway.

Notes on Use

For authority, see K.S.A. 8-1578. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

For a definition of “manufactured home,” see K.S.A. 58-4202(a). For a definition of “mobile home,” see K.S.A. 58-4202(b).

121.79

**RIDING ON A PORTION OF A VEHICLE NOT DESIGNATED OR
INTENDED FOR USE OF PASSENGERS**

No operator of a motor vehicle shall allow any person under the age of 14 to ride on any vehicle or any portion thereof not designated or intended for the use of passengers when the vehicle is in motion.

Notes on Use

For authority, see K.S.A. 8-1578a. Subsection (c) states that the statute is not applicable under certain circumstances and shall apply only when a vehicle is being operated within the corporate limits of a city or on the state highway system.

121.80**OPERATION OF SNOWMOBILE****A. Controlled-Access Highway**

No person shall operate a snowmobile on any controlled-access highway.

B. Other Highways

No person shall operate a snowmobile on any highway, except when crossing the highway at a right angle, or when use of the highway by other motor vehicles is impossible because of snow, or when such operation is lawfully authorized.

Notes on Use

For authority, see K.S.A. 8-1585. See introductory instruction PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

D. SPECIAL STATUTES AND DOCTRINES**121.85****RIGHT TO ASSUME OTHERS WILL OBEY LAW**

Persons using a public street or highway have the right to assume that each will obey the law. Each is entitled to rely on this assumption until *(he)* *(she)* has knowledge to the contrary.

Notes on Use

This instruction is sufficiently broad to cover any vehicular negligence case involving drivers or pedestrians.

Comment

The word “law” as used in the first sentence of the instruction refers to duties imposed by both the common law and by statute. See PIK 4th 121.01, Violation of Law Constitutes Negligence, and Notes on Use.

The rule stated in the instruction was discussed and applied in *Gardner v. Pereboom*, 197 Kan. 188, 416 P.2d 67 (1966), and in *Borggren v. Liebling*, 198 Kan. 161, 422 P.2d 884 (1967). The rule is also supported by the following cases: *Kelty v. Best Cabs, Inc.*, 206 Kan. 654, 481 P.2d 980 (1971); *Logan v. McPhail*, 208 Kan. 770, 494 P.2d 1191 (1972); *Lehar v. Rogers*, 208 Kan. 831, 494 P.2d 1124 (1972); and *Hallett v. Stone*, 216 Kan. 568, 534 P.2d 232 (1975).

One driving on a highway protected by “yield” signs has the right to assume that vehicles approaching on intersecting highways will stop or yield the right of way at intersections, and the driver on the protected highway is not negligent in acting upon this assumption until he has knowledge to the contrary. *Harbaugh v. Darr*, 200 Kan. 610, 438 P.2d 74 (1968).

The driver of an automobile with the right of way at an intersection may assume that others will comply with the law, but he is not absolved from the consequences of his own independent negligence in keeping a proper lookout. *Morris v. Hoesch*, 204 Kan. 735, 466 P.2d 272 (1970).

A passenger has the equal right to assume that other motorists will observe the rules of the road. *Kelty v. Best Cabs, Inc.*, 206 Kan. 654, 481 P.2d 980 (1971).

121.86**EMERGENCY**

The Committee recommends that no instruction be given on the doctrine of sudden emergency.

Comment

The recommendation is based on *Mesecher v. Cropp*, 213 Kan. 695, 518 P.2d 504 (1974), wherein the Supreme Court of Kansas questioned the continued practice of giving the instruction. In that case the court referred to the theory and problems its use presented as reflected in the cases of *Lawrence v. Deemy*, 204 Kan. 299, 461 P.2d 770 (1969) and *Kline v. Emmele*, 204 Kan. 629, 465 P.2d 970 (1970).

In *Lawrence v. Deemy*, 204 Kan. 299, 461 P.2d 770 (1969), the court observed that the doctrine could not be considered apart from the fundamental rule that everyone is under a duty to exercise ordinary care and that a claim under the doctrine was but a denial of negligence. It reasoned that the emergency circumstances were merely a factor to be considered in determining the reasonable character of the action taken and whether the choice was negligent. In *Kline v. Emmele*, 204 Kan. 629, 465 P.2d 970 (1970), the court approved the trial court's refusal to give the instruction. In *Hallett v. Stone*, 216 Kan. 568, 534 P.2d 232 (1975), the trial court was reversed, in part, for giving an instruction on the doctrine.

The Committee believes there is no valid justification for the continued giving of the instruction. However, the emergency circumstances are a proper matter for argument by counsel.

In *Bayer v. Shupe Bros. Co.*, 223 Kan. 668, 671, 576 P.2d 1078 (1978), the Supreme Court noted the doctrine of sudden emergency is properly one for argument by counsel and held it was not error to refuse to give an instruction on sudden emergency.

121.87

UNAVOIDABLE ACCIDENT

The Committee recommends that no instruction be given on the doctrine of unavoidable accident.

Comment

The recommendation that no unavoidable accident instruction be given is based on several compelling reasons. First, the instruction is misleading to a jury when informed that a defendant is not responsible for the consequences of an “accident.” See *Kreh v. Trinkle*, 185 Kan. 329, 343 P.2d 213 (1959).

Second, the theory of the typical unavoidable accident instruction is inherently illogical. The term “accident” carries an implication that negligence is not involved. It logically follows that the foundation for an accident instruction exists only when the court can say there is no evidence of a negligent act or omission of one or the other, or both, of the parties in the action. In such instance the claim or defense of the party having the burden of proving negligence on the part of the other fails as a matter of law and the issue of negligence must be withdrawn from consideration by the jury.

Third, the trend has been to disapprove unavoidable accident instructions where negligence, burden of proof, and cause have been properly defined in the instructions. See *Herrington v. Pechin*, 198 Kan. 431, 424 P.2d 624 (1967); *Curby v. Ulysses Irrigation Pipe Co., Inc.*, 204 Kan. 456, 464 P.2d 245 (1970). In *Kline v. Emmele*, 204 Kan. 629, 465 P.2d 970 (1970), the trial court properly refused to give an instruction on unavoidable accident where the defendant’s brakes suddenly failed.

121.88**LAST CLEAR CHANCE**

The Committee recommends no instruction be given on the doctrine of last clear chance.

Comment

The Committee believes that no instruction on the doctrine of last clear chance should be given in comparative negligence actions. The purpose of comparative negligence is to allow apportionment on the basis of fault. The doctrine of last clear chance evolved to moderate the harshness of contributory negligence. It admits that the plaintiff has been negligent but that his negligence has ceased. Thus, it is a modification of the doctrine of contributory negligence. With the abolition of contributory negligence as an absolute bar to recovery, it would appear that the factual matters should be a circumstance to be considered in determining the relative fault of the parties. For the rare case that might arise prior to July 1, 1974, when comparative negligence was adopted, see PIK 8.83, first edition (1966).

In *Southard v. Lira*, 212 Kan. 763, 512 P.2d 409 (1973), the Kansas Supreme Court held that a defendant may not rely upon the doctrine of last clear chance.

121.89

**INTOXICATION—UNDER THE INFLUENCE OF
INTOXICATING LIQUOR OR DRUGS****A. B.A.T. .08 or More**

It is unlawful for any person to operate or attempt to operate any vehicle while the alcohol concentration in that person's blood or breath, [at the time or within three hours after the person has operated or attempted to operate the vehicle] is .08 or more.

B. Under the Influence of Alcohol

It is unlawful for any person who is under the influence of alcohol to operate or attempt to operate any vehicle within this state. A person is under the influence of alcohol when the control of that person's mental or physical function is impaired to a degree that the person is rendered incapable of safely driving a vehicle.

C. Under the Influence of Drugs

It is unlawful for any person who is under the influence of any drug or combination of drugs to operate or attempt to operate a vehicle within this state. A person is under the influence of drugs when the control of that person's mental or physical functions is impaired to a degree that the person is rendered incapable of safely driving a vehicle.

D. Under the Influence of a Combination of Alcohol and Drugs

It is unlawful for any person who is under the influence of a combination of alcohol and any drug or drugs to operate or attempt to operate a vehicle within this state. A person is under the influence of a combination of alcohol and drugs when the control of that person's mental or physical function is impaired to a degree that the person is rendered incapable of safely driving a vehicle.

E. Degree of Care

A *(driver) (pedestrian)* who is voluntarily under the influence of *(alcohol) (drugs) (a combination of alcohol and drugs)* must exercise the same degree of care under the circumstances then existing as a person who is not under the influence of *(alcohol) (drugs) (a combination of alcohol and drugs)*.

Notes on Use

For authority, see K.S.A. 8-1567. The applicable category should be selected.

K.S.A. 8-1543 provides that a pedestrian who is under the influence of alcohol or any drug to a degree which renders the person a hazard shall not walk or be upon a highway. The Committee recommends that no separate instruction be given on this statute since “under the influence” is adequately covered by this instruction. In cases arising prior to July 1, 2011, the B.A.T. was required to be performed within two hours after the defendant operated or attempted to operate a vehicle.

Comment

The phrase “driving under the influence” is not unconstitutionally vague. *State v. Campbell*, 9 Kan. App. 2d 474, 475, 681 P.2d 679 (1984). In *Townsend v. Jones*, 183 Kan. 543, 548, 331 P.2d 890 (1958), intoxication of a pedestrian was held not to constitute negligence per se, but is relevant upon the issue of care and caution.

The court in *State v. Larson*, 12 Kan. App. 2d 198, 737 P.2d 880 (1987), held that K.S.A. 8-1567(a)(1) creates a new crime of driving with a blood or breath alcohol concentration of .10 or above, regardless whether the driver is under the influence of alcohol to the extent he or she is incapable of driving safely. See also *State v. Zito*, 11 Kan. App. 2d 432, 724 P.2d 149 (1986).

The provisions of K.S.A. 8-1567 were held constitutional in *State v. Larson*, 12 Kan. App. 2d 198, 737 P.2d 880 (1987); *City of Overland Park v. Denning*, 12 Kan. App. 2d 375, 744 P.2d 523 (1987); and *City of Ottawa v. Brown*, 11 Kan. App. 2d 581, 730 P.2d 364 (1986).

The court in *City of Wichita v. Hull*, 11 Kan. App. 2d 441, 724 P.2d 699 (1986), made clear that driving under the influence of alcohol or drugs in violation of K.S.A. 8-1567 is an absolute liability offense; thus intent is not an element.

121.90

GUEST STATUTE

The guest statute is no longer applicable.

Comment

The Kansas guest statute as set forth in K.S.A. 8-122b was held unconstitutional and void as a denial of equal protection of the law under the Fourteenth Amendment to the United States Constitution and Sections 1 and 2 of the Kansas Bill of Rights for the reason that the classifications provided in the statute were arbitrary and discriminatory and had no rational basis. See *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974). Thereafter, the guest statute was repealed by the Legislature of Kansas in Chapter 32, 1974 Session Laws of Kansas.

121.91

NEGLIGENT ENTRUSTMENT—UNDERAGE DRIVER

An owner of a motor vehicle causing or knowingly permitting a minor under the age of sixteen years to drive a vehicle upon a highway, or any person who gives or furnishes a motor vehicle to a minor under the age of sixteen, shall be liable (with the minor) for any damages caused by the negligence of the minor in driving the vehicle.

Notes on Use

This instruction is a paraphrase of K.S.A. 8-222. The parenthetical reference should be used if the action is against both the furnishing person and the minor. The statute provides that there is joint and several liability.

If the cause of action is framed under K.S.A. 8-263 (the entrustment of a vehicle by a parent or guardian to his or her child or ward under 18 who is unauthorized to drive or who violates the provisions of the Driver's License Act), the instruction should be modified as applicable. If the cause of action is framed under K.S.A. 8-264 (permitting an unlicensed person to drive a vehicle), the instruction should also be modified as applicable.

Comment

In *Smithson v. Dunham*, 201 Kan. 455, 441 P.2d 823 (1968), the Kansas Supreme Court held that the negligence of a restricted driver under K.S.A. 8-237 was imputed to and barred recovery by his passenger parent against a driver of another vehicle. In *Upland Mutual Insurance, Inc. v. Noel*, 214 Kan. 145, 519 P.2d 737 (1974), the Kansas Supreme Court held that an exclusion clause in the homeowner's liability insurance policy was limited in scope to cases where the claim was based directly and necessarily upon negligence in the ownership, maintenance, operation and use of an automobile, and did not extend to a cause of action based upon the theory of negligent entrustment of an automobile to a known careless and reckless driver. The reader is referred to the Comment in PIK 4th 121.92, Negligent Entrustment—Incompetent Driver.

In *Yetsko v. Panure*, 272 Kan. 741, 750, 35 P.3d 904 (2001), the Supreme Court concluded that the operation of K.S.A. 8-222 was not altered or negated by the adoption of comparative fault.

121.92

NEGLIGENT ENTRUSTMENT—INCOMPETENT DRIVER

A person who furnishes a motor vehicle to a person *(he)* *(she)* knows, or had reasonable cause to know, to be an incompetent driver, is liable (with the driver) for any damages caused by the negligence of the driver in the operation of the vehicle.

Notes on Use

The phrase in parenthesis should be used if the action is against both the entruster and the driver.

Reference should be made to PIK 4th 121.91, Negligent Entrustment—Underage Driver, if the case is framed under the provisions of K.S.A. 8-222, 8-263, or 8-264.

Comment

The theory of liability under negligent entrustment is well recognized in Kansas. See *Priestly v. Skourup*, 142 Kan. 127, 45 P.2d 852 (1935); *Richardson v. Erwin*, 174 Kan. 314, 255 P.2d 641 (1953); *Fogo, Administratrix v. Steele*, 180 Kan. 326, 304 P.2d 451 (1956); and *Upland Mutual Insurance, Inc. v. Noel*, 214 Kan. 145, 519 P.2d 737 (1974). In *Upland* the court stated that “the rationale of the ‘negligent entrustment’ cases is not founded upon the negligence of the driver of the automobile but upon the primary negligence of the entruster in supplying the chattel, an automobile, to an incompetent and reckless driver.”

In *Priestly v. Skourup*, 142 Kan. 127, 45 P.2d 852 (1935), a cause of action under negligent entrustment was upheld where a father permitted his son, an incompetent, careless and reckless driver, to operate his car, which struck a pedestrian.

In *Richardson v. Erwin*, 174 Kan. 314, 255 P.2d 641 (1953), a cause of action was not stated against a father under negligent entrustment where the son had been absolved of negligence.

In *Fogo, Administratrix v. Steele*, 180 Kan. 326, 304 P.2d 451 (1956), a mother was held responsible for the negligence of her 20-year-old son by permitting him to drive her car with the knowledge that he was an incompetent, careless and reckless driver.

The authorities above cited generally stand for the proposition that an incompetent person means one, who by reason of age, experience, physical or mental condition, or known habits of recklessness, is incapable of operating a vehicle with ordinary care.

This instruction was cited with approval in *Tran v. Nguyen*, 44 Kan. App. 2d 443, 238 P.3d 314 (2010).

In *Yetsko v. Panure*, 272 Kan. 741, 750, 35 P.3d 904 (2001), the Supreme Court concluded that the operation of K.S.A. 8-222 was not altered or negated by the adoption of comparative fault.

121.93**FAILURE TO USE SEAT BELTS—COMPARATIVE FAULT OR
FAILURE TO MITIGATE DAMAGES****Comment**

The Committee recommends that no instruction be given.

The provisions of K.S.A. 8-1749 require that all passenger cars manufactured and assembled after certain dates be equipped with seat belts.

K.S.A. 8-2501 *et seq.*, the Safety Belt Use Act, provides the occupants of the front seat of passenger cars or autocycles equipped with safety belts shall wear them unless the occupant is: (1) excused for medical reasons; (2) a United States mail carrier delivering or collecting mail; or (3) a newspaper carrier delivering papers. Passengers 14 through 17 years of age must wear safety belts at all times when the passenger car is in motion.

K.S.A. 8-2504(c) provides: “Evidence of failure of any person to use a safety belt shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages.”

E. PASSENGER, AGENCY AND JOINT ENTERPRISE**121.94****NEGLIGENCE OF DRIVER NOT IMPUTED TO PASSENGER**

The vehicle in which plaintiff, _____ (*name of plaintiff passenger*), was riding at the time of the collision was being driven by _____ (*name of driver of vehicle in which plaintiff was riding*).

You are instructed that any negligence on the part of _____ (*name of driver of vehicle in which plaintiff was riding*) is not chargeable to plaintiff, _____ (*name of plaintiff passenger*), and will not bar a recovery for any injury plaintiff received as a result of the fault of the defendant.

Notes on Use

This instruction is to be used when imputed negligence is not an issue. It relates to the claim of a passenger against a wrongdoer other than his own driver. PIK 4th 121.95, Duty of Vehicle Passenger, should follow this instruction. For cases of imputed negligence of a driver to a passenger, see PIK 4th 121.96, Negligence of Driver Imputed to Passenger—Agency and Joint Enterprise.

Comment

The rule is well established in this jurisdiction that the negligence of a driver is not imputed to one who is riding in an automobile as a passenger. *Kendrick v. Atchison, T. & S. F. R. Co.*, 182 Kan. 249, 320 P.2d 1061 (1958). In *Schmidt v. Martin*, 212 Kan. 373, 510 P.2d 1244 (1973), the Kansas Supreme Court gave an exhaustive analysis of the doctrine of imputed negligence and stated “This court from an early date has been highly critical of the doctrine of imputed negligence, pointing out that it is a fiction of the law which finds small favor with the courts.” In that case the court held that in the absence of a true agency relationship, the negligence of a third person caring for a child at the parent’s request will not be imputed to the parent.

In *Southard v. Lira*, 212 Kan. 763, 512 P.2d 409 (1973), the court held that “an agency relationship, aside from joint venture or partnership, which will justify the imputation of a driver’s negligence to his passenger, must be of a master and servant or employer and employee type and further that an ordinary ‘car pool’ or ‘share-the-ride’ agreement is not a contract between the parties which constitutes the driver of an automobile the agent of the passenger.”

For an example of illustrative instructions involving multiple drivers and passengers, see PIK 4th 191.02, Illustrative Instructions.

In *Lightner v. Frank*, 240 Kan. 21, 727 P.2d 430 (1986), the court commented:

“The doctrine of imputed negligence is now approved in Kansas only when applied to two special relationships – the master-servant relationship and joint enterprise. . . . [t]he only logical basis for the imputation of the negligence of one person to another is the right of the latter to control the acts of the former.” 240 Kan. at 26.

See also PIK 4th 121.96, Negligence of Driver Imputed to Passenger—Agency and Joint Enterprise.

121.95

DUTY OF VEHICLE PASSENGER

If a passenger has knowledge of danger and the circumstances are such that an ordinary person would speak out or take other positive action to avoid injury to *(himself) (herself)*, then it is *(his) (her)* duty to do what the ordinary person would do under the circumstances. Unless such knowledge and circumstances exist, *(he) (she)* may rely upon the driver to attend to the operation of the vehicle.

Notes on Use

This instruction is to be used when the claim of the passenger is against a wrongdoer other than his own driver. PIK 4th 121.94, Negligence of Driver Not Imputed to Passenger, should precede this instruction.

For cases when negligence is imputed to a passenger, see PIK 4th 121.96, Negligence of Driver Imputed to Passenger—Agency and Joint Enterprise.

Comment

The following Kansas cases discuss various aspects of the duty of a passenger. *Curtiss v. Fahle*, 157 Kan. 226, 139 P.2d 827 (1943) states that when a passenger has an equal opportunity to observe dangerous conditions, the circumstances may be such as to make it the duty of the passenger to warn or to attempt to control the driver's conduct. In general, the passenger's duty is to use due care for his own safety.

Henderson v. National Mutual Cas. Co., 166 Kan. 576, 203 P.2d 250 (1949) states the rule to be that a passenger in an automobile is required to exercise due care for his own safety. Whether the conduct of a passenger was that of an ordinary reasonable man is for the jury.

Beye v. Andres, 179 Kan. 502, 296 P.2d 1049 (1956) states the general rule that a passenger has a duty to exercise reasonable care for his own safety and that under the evidence the question of contributory negligence of a passenger is one for the jury.

Rupe v. Smith, 181 Kan. 606, 313 P.2d 293 (1957) quoted an early Kansas case and held a passenger is not negligent as a matter of law because he was asleep at the beginning of the mishap resulting in his injury. The following comment from the Restatement, Torts, 495, Comment c (1934) was quoted:

“Save in exceptional situations, a guest or passenger in a vehicle is not required to keep a constant lookout or to see to it that he shall be in a condition to do so. Thus, a plaintiff riding in the front seat may take his attention off the road to look at the scenery or may turn around to speak to a friend in the back or he may go to sleep or read a book without being guilty of contributory negligence if the driver commits some negligent act which the plaintiff, had he been on the alert, might have had the opportunity to prevent...”

Kendrick v. Atchison, T. & S. F. R. Co., 182 Kan. 249, 320 P.2d 1061 (1958) reviews a number of cases and points out that the test applied to determine the duty of a passenger has varied somewhat over the years. This case states: “The plaintiff, a passenger, could only be contributorily negligent by: (1) a failure to use due care for his own safety ... [and] (2) under joint enterprise where the negligence of the driver would be imputed to him.”

The Committee believes the instruction is consistent with the Kansas law considering the varied pronouncements on the subject. The instruction is consistent with the concept of comparative fault (PIK 4th 105.01), and with the accepted rule that one has the right to assume others will obey the law (PIK 4th 121.85).

In *McGlothlin v. Wiles*, 207 Kan. 718, 487 P.2d 533 (1971), the court compared the duty of a passenger with her driver and held that the care imposed on a passenger in the back seat of a vehicle is not commensurate with that required of the driver. A passenger, as a general rule, may properly rely upon the driver to attend to the operation of the car in the absence of knowledge of danger or of facts that would give him such knowledge.

In *Kelty v. Best Cabs, Inc.*, 206 Kan. 654, 481 P.2d 980 (1971), the court held that the trial court properly refused to submit the issue of a passenger's negligence to the jury where a taxicab suddenly drove in front of a car in which the plaintiff was riding.

In *Smith v. Union Pacific Railroad Co.*, 222 Kan. 303, 307, 564 P.2d 514 (1977), the court approved the giving of PIK 8.91 [antecedent of PIK 4th 121.95] and held that a passenger in a vehicle is not contributorily negligent as a matter of law when approaching a railroad track if he or she fails to keep a lookout and warn the driver of any danger.

The court in *Akins v. Hamblin*, 237 Kan. 742, 703 P.2d 771 (1985), held 8.91 [PIK 4th 121.95] applies only where there is a question as to the duty of care a passenger should use for his or her own protection. The court noted it had never been recognized in Kansas that a passenger owes a duty to other passengers or third parties, unless the passenger and driver were involved in a joint enterprise or unless the passenger and driver had a special relationship that created a duty.

In *Siruta v. Siruta*, 301 Kan. 757, 348 P.3d 549 (2015), a mother was the driver of a vehicle in which her child and the child's father were passengers. The vehicle was involved in a one-car rollover accident resulting in the child's death. The father sued the mother for wrongful death of the child. He did not sue for his own injuries. The trial court instructed the jury to compare the fault of the father. The Supreme Court held that PIK 4th 121.95 goes only to a passenger's duty to avoid injury to himself, not to a passenger's duties to other passengers. Comparing a passenger's negligence is appropriate only if the negligence is imputed to the passenger because the passenger and the driver operated the vehicle as a common enterprise or the passenger and the driver had a special relationship.

121.96

**NEGLIGENCE OF DRIVER IMPUTED TO PASSENGER—
AGENCY AND JOINT ENTERPRISE**

If _____ (name of driver) and _____ (name of defendant) were each negligent and the negligence of each caused the injury to the plaintiff, then you must decide whether plaintiff is chargeable with the negligence of _____ (name of driver).

Plaintiff is chargeable with the negligence of _____ (name of driver) if you find:

_____ (name of driver) was acting as the agent of plaintiff.

_____ (name of driver) and plaintiff were operating the vehicle in a joint enterprise.

Notes on Use

Either of the factors set forth in the instruction would be sufficient to impute negligence to the plaintiff passenger. Follow this instruction with PIK 4th 107.01, Principal/Agent Relationship, and/or PIK 4th 121.97, Joint Enterprise Defined. Also give instruction to the effect that the burden of persuasion to establish agency or joint enterprise is on the party so contending.

Comment

Authority for the instruction is set forth in *Angell v. Hester*, 186 Kan. 43, 348 P.2d 1050 (1960).

In order to impute the negligence of the driver to the passenger, the passenger must have exercised control or the right to control the operation of the vehicle. *Heiserman v. Aikman*, 163 Kan. 700, 186 P.2d 252 (1947). The right to control by a principal is part of the definition of agency. (See PIK 4th 107.01.) Equal right to control is included in the definition of joint enterprise. *Hunter v. Brand*, 186 Kan. 415, 350 P.2d 805 (1960). (See PIK 4th 121.96.)

The doctrine of imputed negligence is “a fiction of the law which finds small favor with the courts.” *Hunter v. Brand*, 186 Kan. 415, 418, 350 P.2d 805 (1960).

In *Scott v. McGaugh*, 211 Kan. 323, 506 P.2d 1155 (1973), the court discussed the application of the doctrine of joint enterprise for the vicarious liability of a passenger for the negligence of the driver and held that the trial court erred in instructing the jury that, as a matter of law, the plaintiff and his driver were engaged in a joint venture.

See comment under PIK 4th 121.97, Joint Enterprise Defined, in regard to the issue of joint enterprise.

This instruction is recognized as being in accord with the law in *Jackson v. City of Kansas City*, 235 Kan. 278, 298-299, 680 P.2d 877 (1984).

The doctrine of imputed negligence applies only to two special relationships, the master-servant relationship and joint enterprise. *Lightner v. Frank*, 240 Kan. 21, 727 P.2d 430 (1986). See also *Southard v. Lira*, 212 Kan. 763, 512 P.2d 409 (1973).

121.97

JOINT ENTERPRISE DEFINED

To constitute a joint enterprise between a passenger and driver there must be a common purpose for which they jointly use and occupy the vehicle so as to give each the equal privilege and right to control and manage its operation. The meaning of the word “control” is not necessarily limited to participation in the manual operation of the vehicle; it also includes any situation where there is an understanding between the parties that the passenger has the right, and is possessed of equal authority with the driver, to prescribe conditions of use and operation of the vehicle.

Notes on Use

This instruction is to be used only where joint enterprise is an issue in a motor vehicle case. It should follow PIK 4th 121.96, Negligence of Driver Imputed to Passenger—Agency and Joint Enterprise, which indicates that the existence of a joint enterprise results in a situation where negligence of a driver may be imputed to a passenger.

Comment

As authority for the instruction, see *Hunter v. Brand*, 186 Kan. 415, 350 P.2d 805 (1960), and *Schmid v. Eslick*, 181 Kan. 997, 317 P.2d 459 (1957).

Ordinarily the issue of joint enterprise is a question of law that is determined at pretrial conference. In *Scott v. McGaugh*, 211 Kan. 323, 506 P.2d 1155 (1973), the Supreme Court set forth the elements that must be supported by the evidence before the relationship of the parties will give rise to the application of the doctrine. The court held that there must be “(1) an agreement, (2) a common purpose, (3) a community of interest and (4) an equal right to a voice, accompanied by an equal right of control over the instrumentality (the automobile).” The court stressed that it would be a rare case where a trial court would be justified in imposing vicarious liability upon the passenger as a matter of law in the absence of an express agreement for mutual right of control.

This instruction and comment thereto is recognized as being in accord with the law in *Jackson v. City of Kansas City*, 235 Kan. 278, 298-299, 680 P.2d 877 (1984).

A. LIABILITY OF GOVERNMENTAL ENTITY—KANSAS TORT CLAIMS ACT

For research references and an overview of the Kansas Tort Claims Act, see Palmer, *A Practitioner's Guide to the Kansas Tort Claims Act*, 48 JKBA No. 4, 299 (1979); Bezek, *The Kansas Tort Claims Act: The Evolving Parameters of Governmental Tort Liability*, 66 JKBA No. 8, 30 (1997); and McAllister and Robinson, *The Potential Civil Liability of Law Enforcement Officers and Agencies*, 67 JKBA No. 7, 14 (1998).

122.01

LIABILITY OF GOVERNMENTAL ENTITY

(Name of governmental entity) is liable for damages caused by the (negligence) (gross and wanton conduct) (wrongful act) (failure to act) of an employee occurring within the scope of (his) (her) employment.

Notes on Use

For authority, see the Kansas Tort Claims Act (KTCA), K.S.A. 75-6101 *et seq.* A governmental entity's liability exposure is comparable to that of a private entity unless one of the exceptions to liability is applicable under K.S.A. 75-6104. The burden of proof is upon the governmental entity to establish a statutory exception to liability. The applicable parenthetical words should be selected.

Comment

The KTCA makes liability the rule and immunity the exception, and the burden is on the governmental entity to establish its entitlement to any of the exceptions set forth in K.S.A. 75-6104. *Hopkins v. State*, 237 Kan. 601, 702 P.2d 311 (1985).

A claim based upon negligence is not precluded under the KTCA if none of the exceptions in K.S.A. 75-6104 are applicable. See K.S.A. 75-6103. However, just as in any other negligence action, to establish liability a plaintiff must establish (1) duty, (2) breach of duty, (3) causation, and (4) damages. See *Kirk v. City of Shawnee*, 27 Kan. App. 2d 946, 10 P.3d 27 (2000).

Whether a duty exists is a question of law. Under the "public duty doctrine" a governmental agency's duty to the public at large does not establish a basis for an individual to claim the agency owed a legal duty to the individual personally. No duty exists unless it is established the agency owed a special duty to the injured party. *Kirk v. City of Shawnee*, 27 Kan. App. 2d 946, 10 P.3d 27 (2000).

The duty to warn of an escape is a common-law duty independent from the general public duty to provide police protection (see K.S.A. 75-6104[n]) and there is no immunity under the KTCA. *Cansler v. State*, 234 Kan. 554, 572, 675 P.2d 57 (1984). See also Restatement Second of Torts § 319 (1965).

A police officer may be liable for the use of unreasonable or excessive force in the arrest of a suspect or the treatment of a prisoner following arrest. Neither the officer nor his employer has immunity under the

KTCA for an intentional tort. *Caplinger v. Carter*, 9 Kan. App. 2d 287, 676 P.2d 1300, *rev. denied* 235 Kan. 1041 (1984).

The KTCA does not apply to 42 U.S.C. § 1983 claims. *Cook v. City of Topeka*, 232 Kan. 334, 654 P.2d 953 (1982).

The common-law duty of a city to keep its streets in reasonably safe condition survives the immunity granted under K.S.A. 75-6104(l). See *Draskowich v. City of Kansas City*, 242 Kan. 734, 750 P.2d 411 (1988).

Under the recreational use exception of the KTCA, K.S.A. 75-6104(o), “open area” is not interpreted as limited to outdoor areas. *Jackson v. U.S.D.* 259, 268 Kan. 319, 995 P.2d 844 (2000).

The exception for discretionary functions in K.S.A. 75-6104(e) did not immunize the Kansas Highway Patrol in a retaliation action arising from the involuntary job relocation of a state trooper following his use of the Civil Service Act's appeal procedure. *Hill v. State*, 310 Kan. 490, 448 P.3d 457 (2019). In *Williams v. C-U-Out Bail Bonds, LLC*, 310 Kan. 775, 450 P.3d 330 (2019), the same exception did not provide grounds for immunity for city police officers who chose to discontinue an investigation into forcible entry of a residence by armed bail bondsmen.

122.02

ROAD SIGNS

***(The state) (A county) (A city) (A municipality)* is not liable for damages caused by the *(malfunction) (destruction) (unauthorized removal)* of traffic signs or signals, unless the *(state) (county) (city) (municipality)* failed to correct the problem within a reasonable time after actual or constructive notice of the problem.**

Notes on Use

For authority, see K.S.A. 75-6104(h). See also PIK 4th 122.05, Definition of Road Hazard and PIK 4th 122.06, Notice. The applicable parenthetical words should be selected.

Comment

Further information on warning signs and traffic signals can be found in the Manual of Uniform Traffic Control Devices adopted pursuant to K.S.A. 8-2003.

The responsibility for the duty of a governmental entity to maintain its highways in a reasonably safe condition may not be delegated to an independent contractor. *Trout v. Koss Constr. Co.*, 240 Kan. 86, 92, 727 P.2d 450 (1986).

122.03

WEATHER CONDITIONS ON PUBLIC WAYS

(The state) (A county) (A city) (A municipality) is not liable for damages resulting from (ice) (snow) (other temporary conditions due to weather) on a public way, unless the condition was caused by the negligence of the (state) (county) (city) (municipality).

Notes on Use

For authority, see K.S.A. 75-6104(l). The applicable parenthetical reference should be selected. See instructions on Comparative Fault, PIK 4th, Chapter 105.00.

Comment

The responsibility for the duty of a governmental entity to maintain its highways in a reasonably safe condition may not be delegated to an independent contractor. *Trout v. Koss Constr. Co.*, 240 Kan. 86, 92, 727 P.2d 450 (1986).

K.S.A. 75-6104(l) provides that a governmental agency shall not be liable for damages resulting from accumulation of ice due to natural weather conditions unless the condition is affirmatively caused by the governmental agency. In *Taylor v. Reno County*, 242 Kan. 307, 747 P.2d 100 (1987), the court held that the county was immune because the accumulation of ice upon the bridge was not due to affirmative negligent acts of the county.

The Kansas Tort Claims Act will not protect a city from liability because the city's common-law duty to keep its streets reasonably safe is mandatory. The city has no right or discretion to avoid this duty. *Draskowich v. City of Kansas City*, 242 Kan. 734, 750 P.2d 411 (1988).

In *Draskowich*, the court held that the exceptions contained in K.S.A. 75-6104 did not apply. The ice on the highway was not the result of natural weather conditions, but developed only after the BPU employees turned the water back on and allowed the street to be flooded. The city simply failed to take acts reasonably necessary for the protection of travelers in the westbound lanes. *Draskowich v. City of Kansas City*, 242 Kan. 734, 741, 750 P.2d 411 (1988).

122.04**DUTY TO WARN OF ROAD HAZARD**

You must decide if (*governmental entity*) had a duty to warn travelers of a road hazard. In making the decision you must determine:

- 1. If a hazard existed; and,**
- 2. If a hazard did exist, whether the hazard was self-evident.**

If you find that no hazard existed, or that there was a hazard but it was self-evident, (*governmental entity*) was not required to place signs to warn travelers.

If you find that a hazard existed and that it was not self-evident, then you must determine whether (*governmental entity*) provided a proper sign or barricade needed to warn travelers in order to provide adequate time for the driver to perceive, identify, decide, and perform any necessary maneuver.

Notes on Use

Authority for the instruction is found in *Finkbiner v. Clay County*, 238 Kan. 856, 860-861, 714 P.2d 1380 (1986).

The instruction should be given when applicable along with PIK 4th 122.01, Liability of Governmental Entity, PIK 4th 122.02, Road Signs, and PIK 4th 122.03, Weather Conditions on Public Ways.

122.05

DEFINITION OF ROAD HAZARD

A road hazard is a condition that makes a road dangerous and unsafe for public travel.

Notes on Use

When applicable, this instruction should be given along with PIK 4th 122.01, Duty of Care, PIK 4th 122.03, Weather Conditions on Public Ways, and PIK 4th 122.04, Duty to Warn of Road Hazard.

122.06

NOTICE

***(The state) (A county) (A city) (A municipality)* is liable for injuries resulting from a defect when the *(state) (county) (city) (municipality)* knew of the defect, or by the exercise of ordinary care should have known of the defect, and had a reasonable opportunity to repair or take reasonable steps to prevent injury before the injury was sustained.**

Notes on Use

The applicable parenthetical words should be selected.

Comment

Actual or constructive notice of a malfunctioning or missing sign or signal is a prerequisite to liability under the Kansas Tort Claims Act, K.S.A. 65-6104(h).

**B. CITY STREETS AND SIDEWALKS—CITY’S
COMMON LAW DUTY OF CARE**

122.20

CITY—DUTY OF CARE—STREETS AND SIDEWALKS

A city has a duty to use ordinary care to maintain its (*streets*) (*sidewalks*) in a reasonably safe manner for travel.

Notes on Use

For authority, see *Draskowich v. City of Kansas City*, 242 Kan. 734, 739-743, 750 P.2d 411 (1988). The applicable parenthetical words should be selected.

Comment

A city’s common law duty to keep its streets and sidewalks in a reasonably safe manner is mandatory, and the city has no right or discretion to avoid the duty. See *Tuley v. City of Kansas City*, 17 Kan. App. 2d 661, 843 P.2d 267 (1992). See also *Draskowich v. City of Kansas City*, 242 Kan. 734, 750 P.2d 411 (1988) and *Schmeck v. City of Shawnee*, 232 Kan. 11, 651 P.2d 585 (1982).

The “slight defect rule” for sidewalks applies to either public or private sidewalks. *Barnett-Holdgraf v. Mutual Life Ins. Co. of New York*, 27 Kan. App. 2d 267, 3 P.3d 89 (2000). In *Elstun v. Spangles, Inc.*, 289 Kan. 754, 217 P.3d 450 (2009), the Supreme Court declined to extend the slight-defect rule to parking lots, citing the differences between sidewalks and parking lots.

122.21

CITY—DUTY AS TO PARKING OR PARKWAY

In maintaining a parkway or parking, a city has a duty to use a degree of care equal to the use of the parking at the particular place as would reasonably be anticipated.

In determining what use might reasonably be anticipated, you should consider *(the amount and nature of the parking) (the amount of the sidewalks of the city) (the availability of sidewalks and crosswalks) (the reasonableness of using the portion of the street provided for vehicular traffic for reaching the crosswalk and sidewalk) (any customary use) (the necessity of a person to use the parking)*, together with all the other facts and circumstances in the case.

Notes on Use

For authority, see *Dunn v. City of Emporia*, 181 Kan. 334, 311 P.2d 296 (1957). This instruction should be used when the claimed defect is in the parking. The applicable parenthetical words should be selected.

Comment

Where a serious defect exists in that portion of a street known as the parking, at a place where numerous pedestrians would regularly and customarily travel, the city, having knowledge of the defect, is bound to anticipate such use and is obligated to use a higher than ordinary degree of care in making such a place safe for pedestrian travel. See *Dunn v. City of Emporia*, 181 Kan. 334, 311 P.2d 296 (1957). Cases are cited stating that a city is ordinarily not held to the same degree of care in maintaining parking as it is held in maintaining sidewalks.

In determining the question of care, consideration should be given to the amount of parking, to the amount of sidewalks, *Dargatz v. Dodge City*, 151 Kan. 747, 100 P.2d 680 (1940); and to the reasonableness of using parking instead of that portion of streets used for vehicular traffic, *Gilmore v. Kansas City*, 157 Kan. 552, 142 P.2d 699 (1943). For a case dealing with the use of curbs, see *Register v. City of Pittsburg*, 139 Kan. 753, 33 P.2d 173 (1934). For a case dealing with the use of a gutter, see *McCollister v. City of Wichita*, 180 Kan. 401, 304 P.2d 543 (1956).

122.22

CITY—NOTICE OF DEFECT

A city is liable to persons using the (*streets*) (*sidewalks*) for injuries resulting from a defect thereon when it knew of the defect, or by the exercise of ordinary care should have known of the defect, and had a reasonable opportunity to repair it before the injuries were sustained.

Notes on Use

For authority, see *McCollister v. City of Wichita*, 180 Kan. 401, 403, 304 P.2d 543 (1956). This instruction should be given with PIK 4th 122.20, City—Duty of Care—Streets and Sidewalks. Where a defect is caused by a city or by those for whose acts it is responsible, no proof of notice is necessary and this instruction should not be used. *Smith v. Kansas City*, 158 Kan. 213, 146 P.2d 660 (1944). See PIK 4th 122.23, City—Implied Notice—Defect Caused by City, and PIK 4th 122.24, City—Implied Notice—Long Existence of Obvious Defect.

Comment

In *McCollister v. City of Wichita*, 180 Kan. 401, 304 P.2d 543 (1956), a cause of action was stated for an injury to a pedestrian caused when she stepped from a sidewalk and curb into a gutter where a defect existed. The nature of the defect was also considered. As to constructive notice, see *Smith v. Krebs*, 166 Kan. 586, 203 P.2d 215 (1949), and *Seymour v. Kelso*, 136 Kan. 543, 549, 16 P.2d 958 (1932). Officers are not obligated to make an inspection of structures on adjacent land to determine whether a street is safe. *Durst v. Wareham*, 132 Kan. 785, 297 P. 675 (1931).

122.23**CITY—IMPLIED NOTICE—DEFECT CAUSED BY CITY**

Where a defect in a street was caused by a city or by those for whose acts it is responsible, no proof of notice to the city of the defect is required.

Notes on Use

For authority, see *Gilmore v. Kansas City*, 157 Kan. 552, 142 P.2d 699 (1943). This instruction should be given with PIK 4th 122.20, City—Duty of Care—Streets and Sidewalks. PIK 4th 122.22, City—Notice of Defect, should be given only when some work or activity of city employees or agents created the defect.

Comment

See *Gilmore v. Kansas City*, 157 Kan. 552, 142 P.2d 699 (1943), in which case a hole had been caused by the removal of an electric-light pole by the city or by a quasi-municipal board operating for the city as a separate corporation or agency.

122.24

**CITY—IMPLIED NOTICE—LONG EXISTENCE
OF OBVIOUS DEFECT**

If a defect is obvious and has existed long enough that a city should have known it, the city is charged with knowledge, even though it did not actually have knowledge of the defect.

Notes on Use

For authority, see *Smith v. Krebs*, 166 Kan. 586, 203 P.2d 215 (1949). This instruction should be given with PIK 4th 122.20, City—Duty of Care—Streets and Sidewalks. PIK 4th 122.22, City—Notice of Defect, should be given when reliance is had upon long existence of the defect.

A. MEDICAL**123.01****DUTY OF HEALTH CARE PROVIDER**

A _____ has a duty to use the learning and skill ordinarily used by other members of that same field of medicine in the same or similar communities and circumstances. In using this learning and skill, the _____ must also use ordinary care and diligence. A violation of this duty is negligence.

[This instruction sets forth the duty _____ (insert name of health care provider) owed to _____ (insert name of plaintiff) regarding the following claim(s): _____ (insert particular claim from plaintiff's contentions).]

Notes on Use

The name of the particular type of health care provider such as medical doctor, osteopathic physician, dentist, chiropractor, or nurse should be substituted for the general term.

See PIK 4th 123.02 for the duty of a hospital; 123.12 for the duty of a medical specialist; and 123.14 regarding a health care provider's duty of disclosure and consent.

See PIK 4th 123.10 on establishing the health care provider's standard of care by expert testimony.

When it is agreed that the standard of medical procedure is universal, consideration should be given to deleting reference to "similar communities" as it may be confusing to jurors who hear experts from other states or areas testify. If the standard is universal, the jury should not be concerned with using geography as a criterion for comparison of standard of practice.

This instruction should be used rather than PIK 4th 123.12, Duty of Medical Specialist, when the health care provider is not a specialist. Some cases may involve multiple health care providers or multiple claims subject to different duties of care. To avoid jury confusion, the Committee recommends the bracketed portion of the instruction be given so that the jury can identify which claims are governed by this instruction.

Comment

Proof of malpractice requires two evidentiary steps. It requires evidence as to the recognized standards of the medical community in the particular kind of case, and a showing that the health care provider in question negligently departed from the standard in treating the patient. Three elements must be proven through expert testimony in order for the plaintiff to prevail in a medical malpractice case: (1) that a duty was owed by the health care provider to the patient; (2) that the duty was breached; and (3) that a causal connection existed between the breached duty and the injury sustained by the patient. *Wozniak v. Lipoff*, 242 Kan. 583, 587, 750 P.2d 971 (1988).

The trial court should specify in the instructions those specific allegations of negligence concerning which there is evidence. *Natanson v. Kline*, 186 Kan. 393, 399, 350 P.2d 1093 (1960), *clarified* 187 Kan.

186, 354 P.2d 670 (1960). In *Foster v. Klaumann*, 296 Kan. 295, 294 P.3d 223 (2013), the court held it was not reversible error to give the general physician duty of care instruction (PIK 4th 123.01) along with the specialist duty of care instruction (PIK 4th 123.12) in a medical malpractice action against a specialist.

Physician-patient relationship. The existence of the duty of care is dependent on the existence of a physician-patient relationship. A doctor must take some action to treat a patient in order for the relationship to be established. A physician who gives an informed opinion at the request of a treating physician does not owe a duty to the patient because no physician-patient relationship has been created. *Irvin v. Smith*, 272 Kan. 112, 31 P.3d 934 (2001).

A physician-patient relationship is not established by the mere fact that a physician has agreed to be on call for consultation. The physician must take some action to treat a patient to establish the relationship. *Seeber v. Ebeling*, 36 Kan. App. 2d 501, 141 P.3d 1180 (2006).

Duty of Care. The relation of a health care provider to his or her patient is implied by law. That duty is to possess and exercise that reasonable degree of learning and skill ordinarily possessed by members of his or her profession and of the school of medicine in the community where he or she practices or in similar communities at the time of the treatment in question. The health care provider also owes a duty to exercise ordinary care and diligence in treating a patient. *Delaney v. Cade*, 255 Kan. 199, 211, 873 P.2d 175 (1994); *Douglas v. Lombardino*, 236 Kan. 471, 478, 693 P.2d 1138 (1985); *Roberson v. Counselman*, 235 Kan. 1006, 1010, 686 P.2d 149 (1984), modified by *Delaney v. Cade*, 255 Kan. 199, 873 P.2d 175 (1994); *Durflinger v. Artilles*, 234 Kan. 484, 490-91, 673 P.2d 86 (1983), overruled in part by *Boulanger v. Pol*, 258 Kan. 289, 900 P.2d 823 (1995).

However, a physician is not a guarantor of good results. Liability does not arise merely from bad results, nor if bad results are due to some cause other than the treatment rendered. *Wozniak v. Lipoff*, 242 Kan. 583, 607, 750 P.2d 971 (1988); *Johnston v. Elkins*, 241 Kan. 407, 411, 736 P.2d 935 (1987); *Durflinger v. Artilles*, 234 Kan. 484, 673 P.2d 86 (1983), overruled in part by *Boulanger v. Pol*, 258 Kan. 289, 900 P.2d 823 (1995); *Goheen v. Graber*, 181 Kan. 107, 112, 309 P.2d 636 (1957).

In *Glassman v. Costello*, 267 Kan. 509, 986 P.2d 1050 (1999), the Supreme Court held that it was proper for the trial court to submit the nature and extent of the physician's duty of direction to the jury. The abrogation of vicarious liability of a physician for the acts and omissions of other health care professionals covered by the Health Care Stabilization Fund (K.S.A. 40-3404) does not relieve a physician of the duty to direct members of the surgical team that he heads.

A physician has the same duty of care to a patient who comes under his care due to injuries that were sustained due to the patient's own fault as he does to every other patient. The fault of a patient in bringing about his injuries, necessitating his admission to the hospital, should not be compared with the physician's in failing to render proper treatment. *Huffman v. Thomas*, 26 Kan. App. 2d 685, 994 P.2d 1072 (1999).

In *State v. Naramore*, 25 Kan. App. 2d 302, 325, 965 P.2d 211, rev. denied 266 Kan. 1114 (1998), PIK 3d 123.01 and 123.10 [now PIK 4th 123.01 and 123.10] were cited with approval as an appropriate definition of a doctor's duty and standard of care.

In *Nold v. Binyon*, 272 Kan. 87, 31 P.3d 274 (2001), the Supreme Court held that as a matter of law, a physician who has a doctor-patient relationship with a pregnant woman who intends to carry her fetus to term also has a doctor-patient relationship with the fetus.

"Same or similar communities." For a general discussion of the concept of "same or similar communities," see *Yeats v. Harms*, 193 Kan. 320, 333, 393 P.2d 982 (1964).

The concept retains validity in modern law. See, for example, *Wozniak v. Lipoff*, 242 Kan. 583, 750 P.2d 971 (1988). However, it appears to be eroding. A "strict locality rule" has been rejected in Kansas, and the Supreme Court has stated that modern advances in travel, communication and publishing have narrowed the differences between the standards of care in various types of communities. See *Chandler v. Neosho Memorial Hospital*, 223 Kan. 1, 3-4, 574 P.2d 136 (1977); *Avey v. St. Francis Hospital & School of Nursing*, 201 Kan. 687, 694-698, 442 P.2d 1013 (1968).

Choice of treatment. See PIK 4th 123.11 and accompanying comments.

Res ipsa loquitur. See PIK 4th 123.10-A and accompanying comments.

Abandonment. A physician has a right to withdraw from a case, but is under a duty to give the patient notice and afford the patient an opportunity to procure the services of another physician. Abandonment of a case without such notice and opportunity may subject a physician to liability. *Dicke v. Graves*, 9 Kan. App. 2d 1, 3, 668 P.2d 189 (1983); *Collins v. Meeker*, 198 Kan. 390, 402, 424 P.2d 488 (1967); *Capps v. Valk*, 189 Kan. 287, 290, 369 P.2d 238 (1962).

Statute of limitations. Under K.S.A. 60-513(c), a cause of action in medical malpractice does not accrue until substantial injury results from the alleged act of malpractice or until the fact of injury becomes reasonably ascertainable.

Where there is conflicting evidence as to when a cause of action for medical malpractice is deemed to have accrued under K.S.A. 60-513(c), the matter becomes an issue for determination by the trier of fact. *Jones v. Neuroscience Assocs., Inc.*, 250 Kan. 477, 827 P.2d 51 (1992). *Jones* further holds that the doctrines of “physician-patient relationship” or “continuous treatment” do not toll the statute of limitations. However, evidence of continuous treatment is relevant on the issue of when it was reasonably ascertainable to the plaintiff that an injury was permanent or substantial.

The phrase “reasonably ascertainable” means that when an injury is known to be substantial, a plaintiff in a medical malpractice case has a duty to conduct a reasonable investigation as to whether the injury was caused by negligence. *Kelly v. Barnett*, 23 Kan. App. 2d 564, 932 P.2d 471, *rev. denied* 262 Kan. 961 (1997).

If a health care provider enters into an express contract with a patient, the statute of limitations set forth in K.S.A. 60-511 or 60-512, which control contract actions, may apply. See *Juhnke v. Hess*, 211 Kan. 438, 440, 506 P.2d 1142 (1973), and *Noel v. Proud*, 189 Kan. 6, 11, 367 P.2d 61 (1961).

For a discussion on how to determine whether a medical malpractice action sounds in tort or contract, see *Malone v. University of Kansas Medical Center*, 220 Kan. 371, 374-376, 552 P.2d 885 (1976).

Health care professions subject to medical malpractice actions. A variety of types of health care providers besides physicians have been held to be liable in medical malpractice actions.

The rules governing the duties and liability of dentists correspond to the rules of law applicable to physicians. *Simpson v. Davis*, 219 Kan. 584, 549 P.2d 950 (1976); *Dicke v. Graves*, 9 Kan. App. 2d 1, 668 P.2d 189 (1983).

The law relative to medical malpractice is applicable to chiropractors. *Roberson v. Counselman*, 235 Kan. 1006, 686 P.2d 149 (1984), *modified by* *Delaney v. Cade*, 255 Kan. 199, 873 P.2d 175 (1994).

It is also applicable to nurses. *Hiatt v. Groce*, 215 Kan. 14, 523 P.2d 320 (1974).

Psychiatrists are likewise subject to the same duties and liability as physicians. *Durflinger v. Artilles*, 234 Kan. 484, 673 P.2d 86 (1983), *overruled in part by* *Boulanger v. Pol*, 258 Kan. 289, 900 P.2d 823 (1995).

123.02

DUTY OF HOSPITAL—STANDARD OF CARE

A hospital's duty to a patient is to use the degree of reasonable care required by that patient's known physical and mental condition. On medical or scientific matters, a hospital's standard of reasonable care is the same care, skill, and diligence used by hospitals in the same or similar communities and circumstances. A violation of this duty is negligence.

Notes on Use

If the plaintiff's case is submitted to the jury on the common knowledge exception, PIK 4th 123.10-A, Expert Testimony Not Required, should be given.

A version of PIK 4th 123.10, Health Care Provider's Standard of Care—Expert's Testimony, modified to apply to hospitals, should also be given.

Comment

A hospital owes its patients a duty to exercise reasonable care, which is defined as such care, skill and diligence as the known physical and mental condition of the patient may require, and it is that degree of care used by other hospitals in the community or similar communities under like circumstances. *Malone v. University of Kansas Medical Center*, 220 Kan. 371, 375, 552 P.2d 885 (1976); *Hiatt v. Groce*, 215 Kan. 14, 18, 523 P.2d 320 (1974); *Avey v. St. Francis Hospital & School of Nursing*, 201 Kan. 687, 694-698, 442 P.2d 1013 (1968).

Though the standard of care required of a particular hospital is to be determined based upon the degree of care, skill and diligence used by hospitals in the community or in similar communities, the Supreme Court has rejected the "strict locality rule." The court has held that "locality" has more to do with population, location, hospital and laboratory facilities and the medical practitioners and specialists available than with geography, as advances in travel, communication and publication have reduced the gap between rural and urban practitioners in the past century. *Chandler v. Neosho Memorial Hospital*, 223 Kan. 1, 3-5, 574 P.2d 136 (1977); *Avey v. St. Francis Hospital & School of Nursing*, 201 Kan. 687, 696-698, 442 P.2d 1013 (1968). The standard of hospital care that is to be applied in any given case is not a rule of law, but is a matter to be established by the testimony of competent medical experts. *Nold v. Binyon*, 272 Kan. 87, 31 P.3d 274 (2001).

Ordinarily, expert testimony is required to establish negligence on the part of a hospital. An exception to this rule is recognized when the medical procedures are so patently bad that negligence or lack of skill is manifest to a lay observer, or other acts complained of could be regarded as negligent by applying common knowledge and experience. *Hiatt v. Groce*, 215 Kan. 14, 19, 523 P.2d 320 (1974).

The common knowledge exception has been successfully used by plaintiffs in a number of Kansas cases, including the following: *McKnight v. St. Francis Hosp. and School of Nursing*, 224 Kan. 632, 585 P.2d 984 (1978) (fall from an x-ray table); *Karrigan v. Nazareth Convent and Academy, Inc.*, 212 Kan. 44, 510 P.2d 190 (1973) (failure to call doctor for patient in severe pain); and *McCoy v. Wesley Hospital and Nurse Training School*, 188 Kan. 325, 362 P.2d 841 (1961) (fall from bed).

It has been held inapplicable in a number of cases, including *St. Francis Regional Med. Center, Inc. v. Hale*, 12 Kan. App. 2d 614, 752 P.2d 129 (1988) (staph infection); and *Crooks v. Greene*, 12 Kan. App. 2d 62, 736 P.2d 78 (1987) (prescription for Valium).

A hospital is not liable because of the rendering of or failure to render professional services within the hospital by a physician who is licensed to practice medicine and covered under the Health Care Stabilization Fund, if the physician is not an employee or agent of the hospital. *McVay v. Rich*, 18 Kan. App. 2d 746, 859 P.2d 399 (1993) *aff'd* 255 Kan. 371, 874 P.2d 641 (1994).

A similar standard of care is applicable to nursing homes. *Juhnke v. Evangelical Lutheran Good Samaritan Society*, 6 Kan. App. 2d 744, 634 P.2d 1132 (1981); *Mellies v. National Heritage, Inc.*, 6 Kan. App. 2d 910, 636 P.2d 215 (1981).

An instruction similar to PIK 4th 123.02 was approved as an accurate statement of a nursing home's standard of care in *Hoover v. Innovative Health of Kansas, Inc.*, 26 Kan. App. 2d 447, 988 P.2d 287 (1999).

In a nursing home negligence case, the Adult Care Home Licensure Act, K.S.A. 39-323 *et seq.*, and related regulations, K.A.R. 28-39-138 *et seq.*, do not provide an applicable standard of care to be given to the jury in lieu of expert testimony, and do not create a private cause of action. *Tudor v. Wheatland Nursing, LLC*, 42 Kan. App. 2d 624, 214 P.3d 1217 (2009).

123.03

**LIMITATIONS ON LIABILITY OF HEALTH CARE
PROVIDER IN EMERGENCY CASES****A. AT THE SCENE**

Where a _____ in good faith gives emergency care or assistance at the scene of an emergency or accident (*including treatment of a minor without first obtaining the consent of the parent or guardian of such minor*), the _____ is not liable for damages for any acts or omissions other than those damages resulting from gross negligence or from willful or wanton acts or omissions in giving such emergency care or assistance.

or

B. COMPETITIVE SPORTS—MINORS

Where a _____ in good faith gives emergency care or assistance to any minor who may require such care or assistance as a result of having engaged in competitive sports, the _____ is not liable for damages for any acts or omissions other than those damages resulting from gross negligence or from willful or wanton acts or omissions in giving such care or assistance, even if the _____ has not first obtained the consent of the minor's parent or guardian.

or

C. INFORMED CONSENT—WAIVER

Where a _____ in good faith gives emergency care or assistance (*within a hospital*) (*elsewhere*) without consent until such time as the physician employed by the (*patient*) (*patient's family*) (*guardian*) assumes responsibility for such patient's care, _____ is not liable for damages for any acts or omissions other than those resulting from negligence in giving such emergency care or assistance.

Notes on Use

For authority, see K.S.A. 65-2891. Specify the licensed person as the health care provider, as defined in section K.S.A. 65-2891(e).

The intent of the statute is to provide a protection to health care providers who give emergency care. Subsections A and B, which correspond to subsections (a) and (b) of the statute, apply to on-the-scene aid. [See subsection (d) of the statute for authority for this statement.] A health care provider who renders on-the-scene assistance is liable only for gross negligence or willful or wanton acts or omissions.

Subsection C, which corresponds to subsection (c) of the statute, abolishes the ordinary requirement that a health care provider obtain the informed consent of the patient before rendering professional care and treatment, when an emergency exists.

K.S.A. 65-2891(d) provides that if the emergency care or assistance is performed in the physician's or dentist's office, clinic, emergency room or hospital, with or without compensation, the ordinary standards of care and rules of negligence apply, notwithstanding the provisions in paragraphs (a), (b) and (c) of the statute.

K.S.A. 65-2891(b), which allows the health care provider to render good faith emergency treatment without first obtaining the consent of the parent or guardian, apparently is intended to dispense with the requirement of informed consent where a minor is the patient. See *Younts v. St. Francis Hospital & School of Nursing*, 205 Kan. 292, 469 P.2d 330 (1970). See PIK 4th 123.14 for Informed Consent.

The terms "gross negligence" and "wanton conduct" are synonymous. See PIK 4th 103.03. For "willful" conduct, see PIK 4th 103.04. The term "emergency" would include the need for prompt or immediate action for care or treatment. In an appropriate case the judge may have to define a "competitive sport."

Comment

The appellate courts have not yet considered the constitutionality of K.S.A. 65-2891. For a discussion of the equal protection clause as it applies to the constitutionality of a statute, see *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988), and *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974).

123.10

HEALTH CARE PROVIDER'S STANDARD OF CARE—EXPERT TESTIMONY

In determining whether _____ (*insert name*) used the learning, skill, and conduct required, you are not permitted to arbitrarily set a standard of your own or determine this question from your personal knowledge. On questions of medical or scientific nature concerning the standard of care of a _____ (*insert physician/field of specialty*), only those qualified as experts are permitted to testify. The standard of care is established by members of the same profession in the same or similar communities under like circumstances. It follows, therefore, that the only way you may properly find that standard is through evidence presented by a _____ (*insert physician/field of specialty*) expert witness.

Notes on Use

When given, this instruction should follow the applicable duty of care instruction. If a claim is based on the “common knowledge” or *res ipsa loquitur* doctrines, PIK 4th 123.10-A should be given in place of this instruction. When there are multiple claims, the jury should be instructed which claims require expert testimony and which claims do not.

Comment

See K.S.A. 60-3412 regarding basic qualifications for medical expert witnesses.

In *State v. Naramore*, 25 Kan. App. 2d 302, 325, 965 P.2d 211, *rev. denied*, 266 Kan. 1114 (1998), PIK 3d 123.01 and 123.10 [now PIK 4th 123.01 and 123.10] were cited with approval as an appropriate definition of a doctor’s duty and standard of care.

In medical malpractice cases, expert medical testimony is ordinarily required to establish negligence or lack of reasonable care on the part of a health care provider in making a medical diagnosis, performance of medical procedures, and the care and treatment of patients. *Delaney v. Cade*, 255 Kan. 199, 211, 873 P.2d 175 (1995); *Bacon v. Mercy Hosp. of Ft. Scott*, 243 Kan. 303, 307, 756 P.2d 416 (1988); *Webb v. Lungstrum*, 223 Kan. 487, 490, 575 P.2d 22 (1978); *Crowley v. O’Neil*, 4 Kan. App. 2d 491, 494-495, 609 P.2d 198 (1980).

The standard of medical care that is to be applied in any given case is not a rule of law, but a matter to be established by the testimony of competent medical experts. *Nold v. Binyon*, 272 Kan. 87, 31 P.3d 274 (2001).

Learned treatises, found to be relevant and admitted only after the predicate testimony required by K.S.A. 60-460(cc), were held to have been properly admitted to establish a physician’s standard of care in *Wilson v. Knight*, 26 Kan. App. 2d 226, 982 P.2d 400 (1999).

“Common knowledge” exception. Experts are not needed to establish the appropriate standards of care when either the doctrine of common knowledge or the doctrine of *res ipsa loquitur* applies. *Hubbard v. Mellion*, 48 Kan App. 2d 1005, 1013-14, 302 P.3d 1084, *rev. denied* 298 Kan. 1202 (2013). See PIK 4th 123.10-A and accompanying comments.

Community standard. The fact that the expert witness has not practiced in the same community as the defendant does not disqualify him or her as an expert, so long as it appears that the expert is familiar with the degree of care and skill used by health care providers in that community. *Chandler v. Neosho Memorial Hospital*, 223 Kan. 1, 3-4, 574 P.2d 136 (1977); *Barnes v. St. Francis Hospital & School of Nursing*, 211 Kan. 315, 319, 507 P.2d 288 (1973); *Avey v. St. Francis Hospital & School of Nursing*, 201 Kan. 687, 692-693, 442 P.2d 1013 (1968).

Qualification of Expert Witness. The admissibility of expert testimony in any medical malpractice liability action is governed by K.S.A. 60-3412. In *Tompkins v. Bise*, 259 Kan. 39, 910 P.2d 185 (1996), reversing *Tompkins v. Bise*, 20 Kan. App. 2d 837, 893 P.2d 262 (1995), the Kansas Supreme Court held that K.S.A. 60-3412 does not require that an expert witness in a medical malpractice action be licensed by the same professional board as the defendant. The definition of “profession” must be related to whether the expert is qualified to perform the procedure at issue and is not limited to the particular licensure of the defendant health care provider.

In *Glassman v. Costello*, 267 Kan. 509, 986 P.2d 1050 (1999), it was held that K.S.A. 60-3412 was not intended to require that only a physician practicing in a particular specialized area could qualify as an expert witness as to the applicable standard of care of a physician practicing in the same specialized area. For example, in *Wisker v. Hart*, 244 Kan. 36, 766 P.2d 168 (1988), the Supreme Court held that the statute does not preclude a surgeon from testifying as to the standard of care applicable to a general practitioner and a general practitioner from testifying as to the standard of care applicable to a surgeon. The opinion further held that the weight to be afforded to testimony of physicians testifying outside their area of specialization is a matter to be determined by the jury.

To qualify as a standard of care expert, K.S.A. 60-3412 requires that the expert must devote at least 50% of such person’s professional time in the two years preceding the incident to “actual clinical practice.” The Court of Appeals addressed this requirement in *Endorf v. Bohlender*, 26 Kan. App. 2d 855, 995 P.2d 896 (2000), and held that the phrase “actual clinical practice” means patient care. However, patient care is not limited to a physical presence or bedside requirement and would include, for example, a practitioner of healing arts who offers advice or addresses the care of a distant patient through electronic media.

In determining whether an expert witness is statutorily qualified to testify to the standard of care, the court should examine the two years preceding the incident to determine if during that time, when considered as a whole, the expert devoted more than 50 percent of the expert’s professional time to actual clinical practice. *Williams v. Lawton*, 288 Kan. 768, 207 P.3d 1027 (2009).

In *Nold v. Binyon*, 272 Kan. 87, 31 P.3d 274 (2001), the Supreme Court held that a physician with extensive experience in gynecology and obstetrics was qualified to testify as to the standards applicable to nurses working in hospital labor and delivery units.

Scope of expert testimony. During direct examination, experts should confine their opinions to relevant matters that are certain or probable. The expert must give his or her opinion within a reasonable medical probability. “Expressions such as ‘probably’ and ‘more likely than not’ and others of similar import are proper qualifications for a medical expert’s opinion testimony if, taken as a whole, the testimony reflects an honest expression of professional opinion as to reasonable medical probabilities.” *Pope v. Ransdell*, 251 Kan. 112, 122, 833 P.2d 965 (1992); *Sharpley v. Roberts*, 249 Kan. 286, 296, 816 P.2d 390 (1991).

The expert need not pinpoint the exact procedure that caused the injury in order to give his or her opinion that a clear deviation from the appropriate standard of care occurred or that the health care provider’s actions proximately caused the injury. *Smith v. Milfeld*, 19 Kan. App. 2d 252, 256, 869 P.2d 748 (1993).

Experts should confine their opinions to matters which are certain or probable and should not testify to matters that are mere possibilities. *Bacon v. Mercy Hosp. of Ft. Scott*, 243 Kan. 303, 307-308, 756 P.2d 416 (1988).

123.11**PHYSICIAN’S SELECTION OF COURSE OF TREATMENT****Comment**

No separate instruction concerning a physician’s selection of treatment is recommended. The Committee believes the applicable standard of care instruction is sufficient to properly instruct the jury when there is a dispute over the course of treatment selected by the physician. The selection among alternative courses of treatment, like other aspects of medical care provided by a physician, must be consistent with the applicable standard of care.

The language of the former version of this instruction stating that a physician had a “right” to exercise his or her best judgment when picking a course of treatment was criticized by the court in *Foster v. Klaumann*, 296 Kan. 295, 294 P.3d 223 (2013). See also *Lee v. Fisher*, 41 Kan. App. 2d 236, 202 P.3d 57, *rev. denied* 289 Kan. 1279 (2009).

123.12

DUTY OF MEDICAL SPECIALIST

A (physician) (surgeon) who holds (himself) (herself) out to be a specialist in a particular field of medicine has a duty to use (his) (her) skill and knowledge as a specialist in a manner consistent with the special degree of skill and knowledge ordinarily possessed by other specialists in the same field of expertise at the time of the (diagnosis) (treatment). A violation of this duty is negligence.

[This instruction sets forth the duty _____ (insert name of health care provider) owed to _____ (insert name of plaintiff) regarding the following claim(s): _____ (insert particular claim from plaintiff's contentions).]

Notes on Use

Use whichever parenthesized words are appropriate, and substitute other words, e.g., “dentist,” if appropriate.

This instruction should be used rather than PIK 4th 123.01, Duty of Health Care Provider, when the defendant has held himself or herself out as being a specialist in an area commonly recognized as such in the medical profession. Some cases may involve multiple health care providers or multiple claims subject to different duties of care. To avoid jury confusion, the Committee recommends the bracketed portion of the instruction be given so that the jury can identify which claims are governed by this instruction.

Comment

The duty of a physician to exercise reasonable and ordinary care and diligence remains the same regardless of the particular medical specialty in which a health care provider practices. However, particular decisions and acts of the physician will vary with the circumstances of the patient's condition and the medical specialty of the physician. *Roberson v. Counselman*, 235 Kan. 1006, 1010, 686 P.2d 149 (1984), modified by *Delaney v. Cade*, 255 Kan. 199, 873 P.2d 175 (1994); *Durflinger v. Artiles*, 234 Kan. 484, 490, 673 P.2d 86 (1983), overruled in part by *Boulanger v. Pol*, 258 Kan. 289, 900 P.2d 823 (1995); *Rule v. Cheeseman*, 181 Kan. 957, 965, 317 P.2d 472 (1957).

In *Foster v. Klaumann*, 296 Kan. 295, 294 P.3d 223 (2013), the Supreme Court held that it was not reversible error for the trial court to give both PIK 4th 123.01 and PIK 4th 123.12, even though it was uncontroverted that the defendant was a specialist. The court held that the two instructions were not necessarily inconsistent.

A physician who makes a referral to another physician is not liable for the other's malpractice, absent negligence in the selection of the other physician or specialist, if there is no agency or concert of action. *Stovall v. Harms*, 214 Kan. 835, 840, 522 P.2d 353 (1974).

A physician who is not a specialist, and yet proceeds with diagnosis, care, and treatment in a specialist's field is held to the standard of care of the specialty with which he or she is dealing. *Aves ex rel. Aves v. Shah*, 997 F.2d 762, 765 (10th Cir. 1993).

PIK 3d 123.12 [now PIK 4th 123.12] was cited with approval in *Hibbert v. Ransdell*, 29 Kan. App. 2d 328, 26 P.3d 721 (2001).

123.13

**REFERRAL OF PATIENT TO ANOTHER
HEALTH CARE PROVIDER**

A _____ who undertakes the treatment and care of a patient and refers the patient to a _____ for treatment and care is not legally responsible for any negligence on the part of the _____ unless *(he)* *(she)* has failed to exercise reasonable care in selecting the _____.

Notes on Use

Insert in the first blank the type of health care provider making the referral (*i.e.*, “physician,” “surgeon,” or some other specialist). In the next three blanks insert the type of health care provider to whom referral has been made, whether another physician or a specialist.

Comment

A physician who calls in or recommends another physician or surgeon is not liable for the other’s malpractice where there is no agency, concert of action, or negligence in the selection. *Stovall v. Harms*, 214 Kan. 835, 522 P.2d 353 (1974).

A physician is liable, however, for the negligence of another physician or specialist to whom he or she has made referral if the latter acts as his agent, employee, or assistant. *Natanson v. Kline*, 186 Kan. 393, 411-412, 350 P.2d 1093, *clarified* 187 Kan. 186, 354 P.2d 670 (1960).

However, in *Bartal v. Brower*, 268 Kan. 195, 993 P.2d 629 (1999), it was held that a physician who associated with another surgeon to do a portion of a surgical procedure had the duty of informing the parents of a minor about all of the possible consequences of the surgery, including those portions of the surgery to be performed by the associated specialist, or to make sure that the specialist met with the parents and obtained their informed consent for the part of the surgery that he intended to perform.

123.14

DISCLOSURE AND CONSENT—DUTY OF HEALTH CARE PROVIDER

A _____ has a duty to make a reasonable disclosure to the patient of the nature and probable consequences of the suggested or recommended treatment including the dangers within *(his)* *(her)* knowledge which are possible in the treatment proposed. This disclosure is required so the patient can make an intelligent informed consent to the proposed treatment. The duty of the _____ to disclose is limited to those disclosures which a _____ would reasonably make under the same or similar circumstances.

If a complete disclosure of all facts, diagnoses and possible consequences would endanger the recovery of the patient because of an existing physical or mental condition, the _____ may withhold such information.

Notes on Use

This instruction covers the duty of a physician, dentist, anesthesiologist or other specialist to disclose fully those facts necessary for the patient to make an informed consent to a proposed course of treatment. The type of health care provider whose conduct is at issue should be inserted in the blanks.

Comment

The above instruction is based upon the doctrine of “informed consent” as established in *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093, *clarified* 187 Kan. 186, 354 P.2d 670 (1960).

Funke v. Fieldman, 212 Kan. 524, 512 P.2d 539 (1973), contains a comprehensive review of the law relating to informed consent. The case deals with a physician’s duty to make a reasonable disclosure to his or her patient of the dangers within the physician’s knowledge which are incident to or possible in the proposed treatment. The case also discussed the plaintiff’s burden to prove a causal connection between the lack of disclosure and the injury that plaintiff eventually suffered.

Other cases discussing the doctrine include: *Wozniak v. Lipoff*, 242 Kan. 583, 597-598, 750 P.2d 971 (1988); *Lindquist v. Ayerst Laboratories, Inc.*, 227 Kan. 308, 607 P.2d 1339 (1980); *Charley v. Cameron*, 215 Kan. 750, 756-757, 528 P.2d 1205 (1974); *Stovall v. Harms*, 214 Kan. 835, 842, 522 P.2d 353 (1974); and *Tatro v. Lueken*, 212 Kan. 606, 512 P.2d 529 (1973).

In *Wecker v. Amend*, 22 Kan. App. 2d 498, 918 P.2d 658 (1996), it was held that the doctrine of informed consent requires a physician to make a reasonable disclosure to a patient of medically acceptable alternative treatments, including the option of no treatment, when there was evidence that choosing no treatment at all was a viable medical option. The court held that it was prejudicial error not to modify PIK 2d 15.16 [antecedent of PIK 4th 123.14] to include the duty to disclose to the patient the option of no treatment.

Whether or not a physician has informed his patient of the inherent risks and hazards of a proposed form of treatment is question of fact concerning which lay witnesses are competent to testify. The establishment of the fact is not dependent upon expert medical testimony. *Natanson v. Kline*, 187 Kan. 186, 190, 354 P.2d 670 (1960).

Where disclosure of the inherent risks and hazards have been made to the patient, however, and the question is whether the physician’s disclosure is sufficient to accord with disclosures made by reasonable

medical practitioners under the same or similar circumstances, expert medical testimony will be required. *Charley v. Cameron*, 215 Kan. 750, 757, 528 P.2d 1205 (1974).

Although a physician may not minimize the known risks of a procedure in order to induce a patient's consent, the physician is not obligated to inform the patient of every infinitesimal, imaginative or speculative risk. *Funke v. Fieldman*, 212 Kan. 524, 535, 512 P.2d 539 (1973); *Collins v. Meeker*, 198 Kan. 390, 397, 424 P.2d 488 (1967).

The plaintiff must establish a causal connection between the physician's failure to properly disclose risks and the harm suffered. In order to establish the causal connection it must be shown a) that the unrevealed risk that should have been made known actually materialized, and b) that disclosure of the risk to the patient would have resulted in a decision against undergoing the treatment. *Savina v. Sterling Drug, Inc.*, 247 Kan. 105, 132, 795 P.2d 915 (1990); *Funke v. Fieldman*, 212 Kan. 524, 535, 536, 512 P.2d 539 (1973).

A general practitioner referring a patient to a psychiatric specialist has been held to have no duty to inform the patient of the risks and dangers incident to psychiatric treatment. *Stovall v. Harms*, 214 Kan. 835, 843, 522 P.2d 353 (1974).

However, in *Bartal v. Brower*, 268 Kan. 195, 993 P.2d 629 (1999), it was held that a physician who associated with another surgeon to do a portion of a surgical procedure had the duty of informing the parents of a minor about all of the possible consequences of the surgery, including those portions of the surgery to be performed by the associated specialist, or to make sure that the specialist met with the parents and obtained their informed consent for the part of the surgery that he intended to perform.

123.15

CONSENT TO OPERATION

A physician may not perform any surgical operation on a patient without *[the informed consent of the patient] [the informed consent of someone authorized to give consent on behalf of the patient when the patient is unable to consent personally to the operation because the patient is (not in such physical or mental condition as to be able to be consulted) (a minor)]*.

Informed consent means that the *(patient) (authorized person)* must have reasonable knowledge of the nature of the procedure and understanding of the risks involved, and the possible results to be anticipated.

Emergency

[However, under emergency conditions requiring immediate surgery, when it is impossible or impractical to obtain consent because delay would endanger the patient's life or health, a physician is excused from obtaining consent and may proceed if what *(he) (she)* does is in accordance with the ordinary practice among the members of *(his) (her)* profession in the same or similar communities under like conditions.]

Emergency Arising During Operation

[However, if during the course of a surgical operation to which the patient has consented, unforeseen conditions are discovered which necessitate further or different treatment to preserve or protect the health or life of the patient, and it is impossible or impractical to obtain the consent of the patient or someone authorized to consent for *(him) (her)*, the physician may proceed if what *(he) (she)* does is in accordance with the ordinary practice among the members of *(his) (her)* profession in the same or similar communities under like conditions.]

Notes on Use

This instruction is limited to cases involving consent to surgical operations. As to disclosure requirements concerning other types of treatment, see PIK 4th 123.14. The bracketed paragraphs of the instruction should be included when applicable to the evidence. If you find consent is an issue, PIK 4th 123.14 should be given.

Comment

The law regarding consent to surgical operations is reviewed in *Younts v. St. Francis Hospital & School of Nursing*, 205 Kan. 292, 469 P.2d 330 (1970). In the absence of an emergency or unanticipated conditions arising during surgery, a surgeon must obtain the consent of the patient before operating. A surgical procedure performed without the consent of the patient or some authorized person is a technical battery or trespass regardless of the result. To be sufficient, the consent of the patient must be given with

a reasonable knowledge of the nature of the surgery and some understanding of the risks involved and the possible anticipated results. The opinion also provides that when the patient fully appreciates the dangers involved, the failure to make a full disclosure to the patient has no causal relation to the injury. In such event, the consent of the patient to the proposed treatment is an informed consent.

Younts further notes that generally the consent of the parent to a surgical operation on a child is necessary. An exception to this rule is recognized when the child is close to maturity and knowingly gives an informed consent. 205 Kan. at 301.

Consent to the performance of an operation may be granted by conduct. *Charley v. Cameron*, 215 Kan. 750, 755, 528 P.2d 1205 (1974).

In *Bartal v. Brower*, 268 Kan. 195, 993 P.2d 629 (1999), it was held that a physician who associated with another surgeon to do a portion of a surgical procedure had the duty of informing the parents of a minor about all of the possible consequences of the surgery, including those portions of the surgery to be performed by the associated specialist, or to make sure that the specialist met with the parents and obtained their informed consent for the part of the surgery that he intended to perform.

In *Wecker v. Amend*, 22 Kan. App. 2d 498, 918 P.2d 658 (1996), it was held that the doctrine of informed consent requires a physician to make a reasonable disclosure to a patient of medically acceptable alternative treatments, including the option of no treatment, when there was evidence that choosing no treatment at all was a viable medical option. The court held that it was prejudicial error not to modify PIK 2d 15.16 [PIK 4th 123.14] to include the duty to disclose to the patient the option of no treatment.

123.20

DUTY OF PATIENT

A patient has a duty to follow reasonable directions and advice given to the patient by a health care provider.

A health care provider has the right to expect a patient to follow reasonable advice. The failure of a patient to accept reasonable treatment or follow reasonable advice does not relieve the health care provider from the results of earlier malpractice. It only absolves him from liability for any increased injury caused by the patient's failure to accept reasonable treatment and advice.

In this case you must decide whether the patient failed to accept reasonable treatment and advice. If you so find, then you must decide whether that failure should be considered as failure to mitigate damages, or, in the alternative, as fault. If you determine conduct to be fault, it cannot also be considered as a failure to mitigate. Conversely, if you determine conduct to establish a failure to mitigate, it cannot also be considered as fault.

Notes on Use

In many cases, the line between mitigation and fault will be blurred, and in those cases, the decision of whether failure to follow medical advice is comparative fault or failure to mitigate damages must be submitted to the jury.

Comment

In *Parr v. Young*, 121 Kan. 47, 50, 246 P. 181 (1926), the Supreme Court recognized a patient's duty to follow the reasonable directions and advice of his or her physician.

In *Wisker v. Hart*, 244 Kan. 36, 766 P.2d 168 (1988), the Supreme Court approved the giving of a comparative fault instruction in a situation in which the patient's failure to heed his doctor's advice played a major role in the event which brought about his death.

In *Maunz v. Perales*, 276 Kan. 313, 76 P.3d 1027 (2003), the Supreme Court held the jury was properly allowed to evaluate the comparative fault of a mentally disturbed patient who committed suicide. The court held that the comparison should be made under a capacity-based standard.

In *Cox v. Lesko*, 23 Kan. App. 2d 794, 935 P.2d 1086 (1997), the Court of Appeals held that failure to follow medical advice which occurred subsequent to the alleged malpractice constituted failure to mitigate damages, not comparative fault. The Supreme Court reviewed and reversed that holding in its decision, *Cox v. Lesko*, 263 Kan. 805, 953 P.2d 1033 (1998). The court held that the distinction between comparative fault and failure to mitigate damages is a fact question which should be decided by the jury.

The Committee believes that the practical effect of the distinction between comparative fault and failure to mitigate damages is that the prohibition against awarding damages to a plaintiff who bears 50% or more of the fault would not appear to apply to failure to mitigate damages.

In *Huffman v. Thomas*, 26 Kan. App. 2d 685, 994 P.2d 1072 (1999), the Court of Appeals held that the effect of *Wisker v. Hart*, *supra*, and *Cox v. Lesko*, *supra*, would be limited to those cases in which a patient failed to follow a doctor's instructions. The court refused to extend the concepts embodied by those decisions to allow comparison of the fault of plaintiff's decedent in bringing about the injuries for which he was being treated.

123.21

LOSS OF CHANCE—SURVIVAL—CAUSATION

The plaintiff has claimed that *(he) (she)* was denied a substantial chance of survival due to the fault of the defendant. Before you can find the defendant to be at fault, you must find:

1. That _____ would have had a substantial chance of survival if the _____ had been *(diagnosed) (treated)* in a timely manner and under the applicable standard of care.

2. That the defendant failed to *(diagnose) (treat)* _____ *(in a timely manner) (under the applicable standard of care)*; and

3. That the defendant's failure was a substantial factor in causing the death of _____.

As used in this instruction, a “substantial chance of survival” is one which is capable of being estimated, weighed, judged, or recognized by a reasonable mind. As used in this instruction, a “substantial factor” must be distinguished from a factor which had a merely negligible effect in causing _____’s death.

Notes on Use

This instruction should be used when the action is based upon diminution or deprivation of chance of survival. See also PIK 4th 181.05, Verdict Form—Loss of Chance Issue—Survival.

Comment

In deciding the first deprivation of the chance to survive action before a Kansas appellate court, the Supreme Court held, “The question of causation in cases involving negligent treatment of a potentially fatal condition (including failure to refer the patient to an appropriate specialist) is generally a matter to be determined by the finder of fact where the evidence has established the patient had an appreciable chance to survive if given proper treatment. In making the determination, the finder of fact should take into account both the patient’s chances if properly treated and the extent to which the patient’s chances of survival have been reduced by the claimed negligence.” *Roberson v. Counselman*, 235 Kan. 1006, 1020, 686 P.2d 149 (1984), *modified by Delaney v. Cade*, 255 Kan. 199, 873 P.2d 175 (1994). Thus, the Kansas Supreme Court recognized a cause of action for a loss of less than an even chance of survival.

The language in *Roberson*, which refers to the loss of “an appreciable chance to survive,” was disapproved of by the court in *Delaney v. Cade*, 255 Kan. 199, 215, 873 P.2d 175 (1994). The court stated that the “more appropriate language would contemplate a substantial chance to survive.” The remainder of the *Roberson* opinion was found to be sound.

“Where the jury finds a patient would have had a greater than 50 percent chance of surviving had he received proper medical treatment, traditional negligence rules apply, not the loss of chance rule.” *Donnini v. Ouano*, 15 Kan. App. 2d 517, Syl. ¶ 4, 810 P.2d 1163 (1991).

Computing damages in a loss of chance of surviving for a term of years (rather than life) was resolved in *Boody v. U.S.*, 706 F. Supp. 1458 (D. Kan. 1989), where the court held plaintiff's damages should be calculated by multiplying the total value of the decedent's life by the percentage of life lost due to the physician defendant's negligence.

In *Dickey v. Daughety*, 21 Kan. App. 2d 655, 905 P.2d 697 (1995), *aff'd* 260 Kan. 12, 917 P.2d 889 (1996), it was held that the court should apply the percentage of the lost chance award to the damage award before applying the cap on non-pecuniary awards mandated by K.S.A. 60-1903.

In *Pipe v. Hamilton*, 274 Kan. 905, Syl. ¶ 4, 56 P.3d 823 (2002), the Supreme Court reversed the trial court's decision granting summary judgment to a physician who unsuccessfully treated a patient who had only a 5% to 10% chance of survival if treated properly. The court cited with approval the definition of "substantial chance for survival/better recovery" found in PIK 3d 123.21 and 123.22 [now PIK 4th 123.21 and 123.22], and held, as a matter of law, that a 10% chance of survival is not "token or de minimis." The court ruled that the plaintiff's claim must be submitted to a jury.

123.22

LOSS OF CHANCE—BETTER RECOVERY—CAUSATION

The plaintiff has claimed that *(he) (she)* was denied a substantial chance for better recovery due to the fault of the defendant. Before you can find the defendant to be at fault, you must find:

1. That _____ would have had a substantial chance for better recovery if the _____ had been *(diagnosed) (treated)* in a timely manner and under the applicable standard of care;

2. That the defendant failed to *(diagnose) (treat)* _____ *(in a timely manner) (under the applicable standard of care)*; and

3. That the resulting injury or lessened degree of recovery suffered by _____ as a result of defendant's failure was substantial.

As used in this instruction, a “substantial chance for better recovery” is one which is capable of being estimated, weighed, judged, or recognized by a reasonable mind.

Notes on Use

This instruction should be used when the action is based upon diminution or deprivation of chance for better recovery. See also PIK 4th 181.06, Verdict Form—Loss of Chance Issue—Better Recovery.

Comment

In addition to recognizing loss of chance to survive causes of action, the Kansas Supreme Court stated the loss of chance theory in medical malpractice cases also applies to a loss of a substantial chance for better recovery. Loss of better recovery causes of action arise when a “patient survives a preexisting injury or illness but fails to make the extent or quality of recovery that might have resulted absent the alleged medical malpractice.” *Delaney v. Cade*, 255 Kan. 199, 202, 873 P.2d 175 (1994).

The “diminished recovery obtained as a result of malpractice must be one of substance and not merely a minor result that might possibly have been somewhat better absent the malpractice.” *Delaney v. Cade*, 255 Kan. 199, 216, 873 P.2d 175 (1994).

In *Dickey v. Daughety*, 21 Kan. App. 2d 655, 905 P.2d 697 (1995), *aff'd* 260 Kan. 12, 917 P.2d 889 (1996), it was held that the court should apply the percentage of the lost chance award to the damage award before applying the cap on non-pecuniary awards mandated by K.S.A. 60-1903.

In *Pipe v. Hamilton*, 274 Kan. 905, Syl. ¶ 4, 56 P.3d 823 (2002), the Supreme Court reversed the trial court's decision granting summary judgment to a physician who unsuccessfully treated a patient who had only a 5% to 10% chance of survival if treated properly. The court cited with approval the definition of “substantial chance for survival/better recovery” found in PIK 3d 123.21 and 123.22 [now PIK 4th 123.21 and 123.22], and held, as a matter of law, that a 10% chance of survival is not “token or de minimis.” The court ruled that the plaintiff's claim must be submitted to a jury.

123.30**RES IPSA LOQUITUR****Comment**

This instruction has been deleted and is now incorporated in PIK 4th 123.10-A.

B. LEGAL

123.40

DUTY OF LAWYER

A lawyer's duty to a client is to use the learning, skill and care that a reasonably competent lawyer would use in similar circumstances. In using this learning, skill and care, the lawyer must also use ordinary care and diligence. A violation of this duty is negligence.

Notes on Use

For authority, see *Bowman v. Doherty*, 235 Kan. 870, 878, 686 P.2d 112 (1984), Restatement (Second) of Torts § 299A, and cases cited in 7 Am. Jur. 2d, Attorneys at Law § 199. See also Prosser and Keeton on the Law of Torts (5th ed.) pp 185-186 § 32, and Attorney Malpractice: Law and Procedure §§ 2.1-2.12.

If liability is based on negligence, this instruction should be given. Liability may also arise from breach of a fiduciary duty or breach of contract. In those events, the reader is referred to Chapter 125.00, Fiduciary Relationships or Chapter 124.00, Contracts.

Comment

When both elements of contract and tort are present it must be determined, before this instruction is used, whether: (1) the gravamen of the action is the breach of a duty imposed by law upon the attorney-client relationship and not on the contract; or (2) the gist of the action constitutes a breach of a specific term of the contract without reference to legal duties imposed by law upon the relationship. If the facts support the first reference, the action would be in tort and the instruction on negligence would be applicable. If the evidence justifies the second, the action would be in contract and this instruction would be inapplicable. However, when the evidence supports both theories, the issues could be submitted to the jury on both theories as alternative theories of recovery. See *Hunt v. KMG Main Hurdman*, 17 Kan. App. 2d 418, 839 P.2d 45 (1992), and *Pizel v. Zuspahn*, 247 Kan. 54, 72-73, 795 P.2d 42 (1990).

In order to prevail on a claim of legal malpractice, a plaintiff is required to show (1) the duty of the attorney to exercise ordinary skill and knowledge, (2) a breach of that duty, (3) a causal connection between the breach of duty and the resulting injury, and (4) actual loss or damage. Additionally, to prove legal malpractice in the handling of litigation, a plaintiff must establish the validity of the underlying claim by showing that it would have resulted in a favorable judgment in the underlying lawsuit had it not been for the attorney's error. *Canaan v. Bartee*, 276 Kan. 116, 72 P.3d 911 (2003), *cert. denied* 540 U.S. 1090, 124 S. Ct. 962, 157 L. Ed. 2d 795 (2003). *Canaan* further provides that a person convicted in a criminal action must first obtain post conviction relief before maintaining an action alleging malpractice against his or her former criminal defense attorneys.

“ . . . [I]n a legal malpractice action, a plaintiff must show that his attorney failed to use that degree of learning, skill, and care that a reasonably competent lawyer would use in similar circumstances.” *Canaan*, 276 Kan. at 129.

In Kansas, the relationship of an attorney to his or her client is fiduciary in character, binding the attorney to the highest degree of fidelity and good faith to his or her client on account of the trust

and confidence imposed. *Ford v. Guarantee Abstract & Title Co.*, 220 Kan. 244, 261, 553 P.2d 254 (1976); *Alexander v. Russo*, 1 Kan. App. 2d 546, 571 P.2d 350 (1977). See Chapter 125.00, Fiduciary Relationships.

The relationship of attorney-client can only be created by a contract of employment, express or implied. *Young v. Hecht*, 3 Kan. App. 2d 510, 597 P.2d 682 (1979). But see *Pizel v. Zuspahn*, 247 Kan. 54, 795 P.2d 42, *mod and reh. denied* 247 Kan. 699, 803 P.2d 205 (1990), *appeal after remand* 252 Kan. 384, 845 P.2d 37 (1993), regarding liability to parties not in privity and the balancing test used by the court to determine when a nonclient may recover. The balancing test contains six criteria for consideration: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the attorney's conduct and the injury; (5) the policy of preventing future harm; and (6) the burden on the profession of the recognition of liability under the circumstances.

Pizel additionally holds that comparative fault principles apply to legal malpractice actions based upon negligence unless as a matter of law the client had no obligation to act on his or her own behalf. Also see *Pizel v. Whalen*, 252 Kan. 384, 845 P.2d 37 (1993). Following *Pizel v. Zuspahn*, the court in *Wilson-Cunningham v. Meyer*, 16 Kan. App. 2d 197, 820 P.2d 725 (1991), found that children had no cause of action in tort for loss of parent's property against an attorney who had acted as that parent's attorney in a divorce action.

In *Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson*, 250 Kan. 490, 827 P.2d 758 (1992), following the rationale of *Pizel v. Zuspahn*, 247 Kan. 54, 795 P.2d 42 (1990), it was held that a nonclient third-party may have a cause of action against a borrower's lawyer if the lawyer gave advice to the lender or expected his advice to be relied upon by the lender.

An attorney is not liable for professional negligence to his client's adversary; the remedy for an adversary third-party action is an action for malicious prosecution. *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980).

In *Johnson v. Wiegers*, 30 Kan. App. 2d 672, 46 P.3d 563 (2002), the Court of Appeals held that a three step analysis is required to determine whether an attorney owes a duty to a third-party nonclient. First, if the client of the attorney and the third party are adversaries, no duty arises under *Nelson*. Second, if the attorney and client never intended for the work to benefit the third party, no duty arises under *Bank IV*. Third, if the attorney and client arguably intended for the attorney's work to benefit the third party, then the *Pizel* balancing test must be applied to determine if a duty was owed.

A cause of action for legal malpractice accrues as soon as the right to maintain a legal action arises. See *Dearborn Animal Clinic, P.A. v. Wilson*, 248 Kan. 257, 806 P.2d 997 (1991); *Knight v. Myers*, 12 Kan. App. 2d 469, 474, 748 P.2d 896 (1988); and *Pancake House, Inc. v. Redmond*, 239 Kan. 83, 716 P.2d 575 (1986). In *Pancake House*, the Kansas Supreme Court reviewed the four theories that could be applied in Kansas as to the accrual of a cause of action for legal malpractice under K.S.A. 60-513(a)(4) and the application of the applicable statute of limitation under K.S.A. 60-513(b). The court stated:

"Depending upon the facts and circumstances of each case, there are at least four theories which can apply to attorney malpractice in Kansas as to when the accrual of a cause of action occurs and the statute of limitations begins to run. These include:

- (1) The occurrence rule—the statute begins to run at the occurrence of the lawyer's negligent act or omission.
- (2) The damage rule—the client does not accrue a cause of action for malpractice until he suffers appreciable harm or actual damage as a consequence of his lawyer's conduct.
- (3) The discovery rule—the statute does not begin to run until the client discovers, or reasonably should have discovered, the material facts essential to his cause of action against the attorney.

(4) The continuous representation rule—the client’s cause of action does not accrue until the attorney-client relationship is terminated.” *Pancake House*, 239 Kan. at 87.

In *Dearborn Animal Clinic, P.A. v. Wilson*, 248 Kan. 257, 264, 806 P.2d 997 (1991), the Supreme Court discussed the attempt of other states to limit the rule to one theory but stated that: “... practice demonstrates that no matter how desirable it might be to have one black-letter rule that applied in every case, justice and fairness, as well as the statute [K.S.A. 60-513(b)], preclude the adoption of one theory to the exclusion of all others.”

In *KPERS v. Kutak Rock*, 273 Kan. 481, 44 P.3d 407 (2002), the Supreme Court examined an attorney’s duty to steer a client away from bad investment decisions. The court held that “an attorney has a duty to do that which he or she is hired to do by a trust or non-trust client.” *Id.* at 493. The court further held the services to be performed by the defendant law firm were specifically stated in the engagement letter and did not give rise to a duty to render advice regarding the financial wisdom of the investment. *Id.* at 492. In the absence of specific direction from the client, “[t]he scope of the attorney’s duty in the circumstances of this case is commensurate with his or her undertaking.” *Id.* at 495.

In *Bergstrom v. Noah*, 266 Kan. 847, 974 P.2d 531 (1999), the Supreme Court recognized an “error of judgment defense” to a legal malpractice action. The court emphasized that the exception was a narrow one and could not be used where the issue is settled and can be identified through ordinary research and investigative techniques. However, where the law is unclear, or has not been settled by the appellate courts, or involves new occurrences not yet considered by the courts or the legislature, an attorney is not liable for a mere error in judgment if he or she has acted in good faith and in an honest belief that his or her acts are well founded and in the best interest of the client.

123.41

PROOF OF DAMAGES

In order to recover damages from a lawyer for negligence in the handling of a lawsuit, the plaintiff must establish: (1) that the lawyer was negligent; (2) that but for such negligence the prior lawsuit [would have resulted in a collectible judgment in plaintiff's favor] [would have been successfully defended].

Notes on Use

For authority, see *Dings v. Callahan*, 4 Kan. App. 2d 36, 602 P.2d 542 (1979) and *Webb v. Pomeroy*, 8 Kan. App. 2d 246, 655 P.2d 465 (1982), *rev. denied* 232 Kan. 876 (1983). Select the appropriate bracketed phrase and also instruct as to the prior lawsuit.

The fact-finder must make its determination about the outcome of the underlying lawsuit solely on the evidence related to that claim. The Court of Appeals also suggested bifurcation of the two parts of the legal malpractice case would ensure a clean demarcation between the two during trial. *Power Control Devices, Inc. v. Lerner*, 56 Kan. App. 2d 690, Syl. ¶ 4, 437 P.3d 66, *rev. denied* 310 Kan. 1063 (2019).

Comment

In order for a party to prove legal malpractice in the handling of litigation, it is necessary for the plaintiff in the malpractice case to successfully retry the underlying lawsuit. *Webb v. Pomeroy*, 8 Kan. App. 2d 246, 655 P.2d 465 (1982), *reh. denied* 232 Kan. 876 (1983).

When a client asserts a claim against an attorney on the basis of lost settlement opportunity, the client must prove not only a breach of duty but also that the breach caused damage. An element of such cause is proof that the client and the party against whom a claim had been asserted would have reached agreement to settle the litigation in an amount that was ascertainable. See *McConwell v. FMG of Kansas City, Inc.*, 18 Kan. App. 2d 839, 849-851, 861 P.2d 830 (1993).

In *Miller v. Sloan, Listrom, Eisenbarth, Sloan and Glassman*, 267 Kan. 245, 978 P.2d 922 (1999), the Supreme Court found that the defendant law firm had breached its duty to notify the plaintiff (a doctor) of a hearing scheduled for court approval of a settlement between the plaintiff's insurer, a claimant, and the Health Care Stabilization Fund. Nevertheless, the court found that summary judgment on behalf of the defendant law firm was proper because the plaintiff had made no showing of damage: "There can be no finding of malpractice absent a showing of both departure from standards and causal injury." 267 Kan. at 258.

In order to prevail on a claim of legal malpractice, a plaintiff is required to show (1) the duty of the attorney to exercise ordinary skill and knowledge, (2) a breach of that duty, (3) a causal connection between the breach of duty and the resulting injury, and (4) actual loss or damage. Additionally, to prove legal malpractice in the handling of litigation, a plaintiff must establish the validity of the underlying claim by showing that it would have resulted in a favorable judgment in the underlying lawsuit had it not been for the attorney's error. *Canaan v. Bartee*, 276 Kan. 116, 72 P.3d 911 (2003), *cert. denied* 540 U.S. 1090, 124 S. Ct. 962, 157 L. Ed. 2d 795 (2003). Under *Canaan*, a person convicted in a criminal action must first obtain post-conviction relief before maintaining an action against his or her former criminal defense counsel.

In the absence of a basis for awarding actual damages, a claim for punitive damages must also fail. Furthermore, the provisions of K.S.A. 60-3703 that permit a court to decide whether punitive damages can be submitted is constitutional. See *McConwell v. FMG of Kansas City*, 18 Kan. App. 2d 839, 859-864, 861 P.2d 830 (1993).

A legal malpractice plaintiff who bases his or her claim on ineffective assistance of counsel in a criminal case is not required to prove actual innocence of the charged crime. See *Mashaney v. Board of Indigents' Defense Services*, 302 Kan. 625, 652, 355 P.3d 667 (2015). But actual guilt may be relevant to the proximate cause determination. See *Mashaney*, 302 Kan. at 653-55 (Stegall, J., Concurring).

123.42

LAWYERS—DURATION OF PROFESSIONAL EMPLOYMENT

Once a lawyer has undertaken to serve a client, the lawyer's duty to that client continues until *(ended by [consent] [request] of the client) (the lawyer properly withdraws from the employment) (the matter for which the lawyer was employed is concluded)*.

Notes on Use

For authority, see cases cited in 7 Am Jur 2d, Attorneys at Law, pp. 168, 173-175 and Attorney Malpractice: Law and Procedure § 1:3.

Comment

In *Pizel v. Zuspann*, 247 Kan. 54, 795 P.2d 42, *mod. and reh. denied* 247 Kan. 699, 803 P.2d 205 (1990), it was held that the fact that a second attorney subsequently represented a trust settlor did not relieve the settlor's attorney of liability for acts of negligence that occurred prior to the termination of his attorney-client relationship with the settlor. See the six criteria of the balancing test from *Pizel* in determining a lawyer's liability for a nonclient as set forth in the Comment in PIK 4th 123.40, Duty of Lawyer.

Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson, 250 Kan. 490, 827 P.2d 758 (1992), following *Pizel*, states that a legal malpractice claim may not be assigned, acquired through foreclosure or transferred by succession and successor-employer under the National Labor Relations Act. But, a nonclient third-party lender may have a cause of action against a borrower's lawyer if the lawyer gave advice to the lender or expected his advice to be relied upon by the lender.

123.43

COMPENSATION OF LAWYER IMMATERIAL

Whether a lawyer is to be compensated for *(his) (her)* services has no bearing on the duty that *(he) (she)* owes to a person *(he) (she)* undertakes to represent in legal matters.

Notes on Use

For authority, see *Alexander v. Russo*, 1 Kan. App. 2d 546, 571 P.2d 350 (1977).

Comment

An attorney-client relationship can only be created by a contract of employment, express or implied. *Young v. Hecht*, 3 Kan. App. 2d 510, 597 P.2d 682 (1979). However, the obligation to pay a fee, standing alone, does not create an attorney-client relationship. *American Family Mut. Ins. Co. v. Griffin*, 9 Kan. App. 2d 482, 681 P.2d 683 (1984).

The existence of a retainer or fee charge is immaterial to the existence of an attorney-client relationship. *Phillips v. Carson*, 240 Kan. 462, 477-478, 731 P.2d 820 (1987), citing comments to the then Kansas Code of Professional Responsibility, DR 5-104.

123.44

LAWYER’S STANDARD OF CARE—EXPERT TESTIMONY

In determining whether a lawyer used the degree of learning, skill and care required of a reasonably competent lawyer in similar circumstances, you are not permitted to arbitrarily set a standard of your own or determine this question from your personal knowledge. On questions of legal practice only those qualified as experts are permitted to testify. The standard of care is established by members of the same profession in the same or similar communities under like circumstances. It follows, therefore, that the only way you may properly find that standard is through evidence presented by legal expert witnesses.

[However, expert testimony is not required when the evidence shows a breach of duty or lack of reasonable care by the lawyer which is apparent to the average person from common knowledge and experience.]

Notes on Use

For authority, see *Bowman v. Doherty*, 235 Kan. 870, 878-879, 686 P.2d 112 (1984).

Also see *Webb v. Lungstrum*, 223 Kan. 487, 575 P.2d 22 (1978), a medical malpractice case that was approved and applied in *Bowman* “... as a common knowledge exception to the rule requiring expert testimony in malpractice cases.” 235 Kan. at 879. See also *McConwell v. FMG of Kansas City, Inc.*, 18 Kan. App. 2d 839, 847-849, 861 P.2d 830 (1993).

This instruction should follow PIK 4th 123.40, Duty of Lawyer. The bracketed paragraph should be given when applicable.

Comment

In *Leeper v. Schroer*, 241 Kan. 241, 246, 736 P.2d 882 (1987), the Kansas Supreme Court cited with approval their holding in *Bowman v. Doherty*, 235 Kan. 870, 686 P.2d 112 (1984) that:

“Expert testimony is generally required and may be used to prove the standard of care by which the professional actions of the attorney are measured and whether the attorney deviated from the appropriate standard.”

In *Leeper*, the high court further noted a common knowledge exception to the rule requiring expert testimony in malpractice cases. The court again quoted from *Bowman v. Doherty*, 235 Kan. 870, 686 P.2d 112 (1984), with approval that:

“Expert testimony is not necessary where the breach of duty on the part of the attorney, or his failure to use due care, is so clear or obvious that the trier of fact may find a deviation from the appropriate standard of the legal profession from its common knowledge.” 241 Kan. at 246.

Also see *McConwell v. FMG of Kansas City, Inc.*, 18 Kan. App. 2d 839, 861 P.2d 830 (1993).

An attorney is obligated to her or his client to use reasonable and ordinary care and diligence in the handling of cases; to use his or her best judgment; and to exercise that reasonable degree of learning, skill and experience which is ordinarily possessed by other attorneys in the community. What constitutes

negligence in a particular situation is judged by the professional standards of the particular area of the law in which the practitioner is involved. See *McConwell v. FMG of Kansas City, Inc.*, 18 Kan. App. 2d 839, 847-848, 861 P.2d 830 (1993), and *Leeper v. Schroer, Rice, Bryan & Lykins, P.A.*, 241 Kan. 241, 244-246, 736 P.2d 882 (1987).

In *Bergstrom v. Noah*, 266 Kan. 847, 974 P.2d 531 (1999), the Supreme Court recognized an “error of judgment defense” to a legal malpractice action. The court emphasized that the exception was a narrow one and could not be used where the issue is settled and can be identified through ordinary research and investigative techniques. However, where the law is unclear, or has not been settled by the appellate courts, or involves new occurrences not yet considered by the courts or the legislature, an attorney is not liable for a mere error in judgment if he or she has acted in good faith and in an honest belief that his or her acts are well founded and in the best interest of the client.

C. OTHER PROFESSIONS

123.70

DUTY OF OTHER PROFESSIONAL

In performing professional services, (a) (an) _____ has a duty to use that degree of care and skill which would be used by a reasonably competent _____ providing similar services (*in the same community or similar communities*) and acting in similar circumstances.

Notes on Use

This instruction should be used when the claim of liability is founded upon breach of a duty imposed by law. The particular profession (accountant, architect, engineer, pharmacist, surveyor, etc.) should be inserted. Liability may be claimed for breach of an express contract or a fiduciary duty. See PIK 4th Chapter 124.00, Contracts, and PIK 4th Chapter 125.00, Fiduciary Relationships. The action may also be based upon breach of implied warranty. In those rare or unusual cases in which the standard of care may be determined by the locality, the material in parentheses should be included.

Comment

Authority for this instruction may be found in the cases cited in Prosser and Keeton on the Law of Torts (5th ed.) pp 185-186 § 32 and Restatement (Second) of Torts 299A (1965). Kansas cases involving professional liability include: *Hunt v. KMG Main Hurdman*, 17 Kan. App. 2d 418, 839 P.2d 45 (1992); *Bick v. Peat Marwick & Main*, 14 Kan. App. 2d 699, 799 P.2d 94 (1990); *Brueck v. Krings*, 230 Kan. 466, 638 P.2d 904 (1982); *Allen County Comm'rs v. Baker*, 152 Kan. 164, 102 P.2d 1006 (1940) (accountants); *Tamarac Dev. Co. v. Delamater, Freund & Assocs.*, 234 Kan. 618, 675 P.2d 361 (1984); *Hanna v. Huer, Johns, Neel, Rivers & Webb*, 233 Kan. 206, 662 P.2d (1983); *Balagna v. Shawnee County*, 233 Kan. 1068, 668 P.2d 157 (1983); *Koch Industries, Inc. v. Vosko*, 494 F.2d 713 (10th Cir. 1974) (architects and engineers); *McCarty v. Bauer*, 3 Kan. 237 (1865) (surveyor); and *Fuhs v. Barber*, 140 Kan. 373, 36 P.2d 962 (1934) (druggist).

In *Brueck v. Krings*, 230 Kan. 466, 638 P.2d 904 (1982), the court held that claims of loss resulting from failure to perform an audit as required by the Kansas Savings and Loan Code, the Kansas Securities Act and generally accepted accounting principles and from breach of implied and express warranties to conduct the audit according to generally accepted accounting principles and from conducting audits in a negligent, reckless or grossly reckless manner, all sounded in tort as breaches of duties imposed by law, making the two-year statute of limitations applicable.

In *Tamarac Dev. Co., Inc. v. Delamater, Freund and Assocs.*, 234 Kan. 618, 675 P.2d 361 (1984), it was held that in an action against an architectural and engineering firm for breach of an oral contract to supervise grading construction, the cause of action could be based on breach of an express contract or an implied warranty or on negligence.

In *Gillespie v. Seymore*, 19 Kan. App. 2d 754, 770, Syl. ¶ 1, 876 P.2d 193, *rev. den.*, 225 Kan. 1001 (1994), the court held:

“There is no independent duty of an accountant to say ‘no’ to a client who has decided on a non-criminal financial course of action and does not ask the accountant’s

advice. This is true even if the accountant does not think the course of action is a wise idea and another of the accountant's clients might benefit by it."

A. CONTRACTS GENERALLY

124.01

DEFINITION OF CONTRACT

A contract is an agreement between two or more persons consisting of a *(promise that is) (set of promises that are)* legally enforceable.

Notes on Use

There is no limitation on the variety of contract cases that come before the courts except the ingenuity of man; consequently, most of the pattern instructions in this chapter will require modification.

The UCC includes the following definitions [K.S.A. 84-1-201(3) and (12)]:

(12) “Contract” means the total legal obligation that results from the parties’ agreement as affected by this act and any other applicable rules of law.

(3) “Agreement” means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in K.S.A. 84-1-303.

Comment

Mixed questions of law and equity are often involved in contract litigation. Consequently, mixed jury and nonjury issues are often presented. These pattern instructions are designed to aid court and counsel when an issue of fact is properly raised. For cases concerning construction of contracts see PIK 4th 124.14.

124.02

DEFINITION OF SUBCONTRACT

A subcontract is an agreement between a person and a contractor, whereby the person agrees to perform all or part of the work the contractor agreed to perform under a preexisting contract with a third party.

Comment

For authority, see *Calvert Western Exploration Co. v. Diamond Shamrock*, 234 Kan. 699, 675 P.2d 871 (1984). A valid subcontract requires the preexistence of a prime contract between the principal and a contractor. The subcontractor agrees with the contractor to perform all or part of the prime contract. Basic requirements of a subcontract include, among other things, references to work to be performed, performance bonds, and maintenance of liability insurance. *J.W. Thompson Co. v. Welles Products Corp.*, 243 Kan. 503, 758 P.2d 738 (1988).

124.03

FORMATION OF CONTRACTS

A contract may be made in any manner sufficient to show agreement. It may be oral or written, or implied from the conduct of the parties. (*An agreement is sufficient to constitute a contract even though the exact time of its making cannot be determined.*)

Notes on Use

This instruction may be given in any contract case. If there is a dispute over the manner of formation of a contract, this instruction and the applicable portions of PIK 4th 124.04, Offer and Acceptance, should be given.

K.S.A. 84-2-204(1) and (2) serve as the basis for this suggested pattern instruction.

Comment

When the evidence pertaining to the existence of a contract or the terms thereof is conflicting or admits of more than one inference, a question is presented for the trier of facts. *Hays v. Underwood*, 196 Kan. 265, 411 P.2d 717 (1966).

Parties may become contractually obligated by their nonverbal conduct as well as by their use of oral or written words. *Rains v. Weiler*, 101 Kan. 294, 166 P. 235 (1917). The law implies, from circumstances and “the silent language of men’s conduct and actions, contracts, and promises as forcible and binding as those made by express words or through the medium of written memorials.” 1 Addison, Contracts, 54 (8th ed. 1889), quotes *In re Estate of Langdon*, 165 Kan. 267, 274, 195 P.2d 317 (1948).

The existence or nonexistence of a contract is a fact that may be established by direct or circumstantial evidence. *In re Estate of Miller*, 186 Kan. 87, 348 P.2d 1033 (1960); *Ellis v. Berry*, 19 Kan. App. 2d 105, 867 P.2d 1063 (1993). In some situations, such as when there is an alleged contract to make a will, however, the existence of the contract must be proved by clear and convincing evidence. *In re Estate of Stratmann*, 248 Kan. 197, 806 P.2d 459 (1991).

Where there has been substantial performance by the party not bound (under an offer for a unilateral contract) whereby the other has received the desired or requested benefits, the promise becomes binding. *Commercial Asphalt v. Smith*, 196 Kan. 164, 409 P.2d 796 (1966); and *Seneca Nursing Home v. Kansas State Bd. of Social Welfare*, 490 F.2d 1324, 1332 (10th Cir. 1974), *cert. denied* 419 U.S. 841, 95 S. Ct. 72, 42 L. Ed. 2d 69 (1974).

A new contract is implied where an agreement expires by its terms, and the parties continue to perform as before. An implication arises that they have mutually assented to a new contract containing the same provisions as the old, and such a contractual relationship will continue until reasonable notice of termination is given by one party to the other. *Baker v. City of Topeka*, 231 Kan. 328, 644 P.2d 441 (1982). The factors to consider in determining the intent of the parties when a contract is implied in fact are stated in *Allegri v. Providence-St. Margaret Health Center*, 9 Kan. App. 2d 659, 684 P.2d 1031 (1984).

This instruction was approved when there was no dispute as to whether a contract was formed in *Stover v. Superior Industries Int’l, Inc.*, 29 Kan. App. 2d 235, 242, 29 P.3d 967, *rev. denied* 270 Kan. 903 (2000).

124.04**OFFER AND ACCEPTANCE****A. Meeting of the Minds**

An enforceable contract requires an agreement on all essential terms between the contracting parties. The agreement is usually made by one party making an offer and the other party accepting it. An offer and acceptance are commonly referred to as the acts by which the parties have a “meeting of the minds.”

B. The Offer

An offer is a proposal by one party to another party to perform certain actions, provided the other party will perform certain actions in return. The terms of the proposal must be certain and the offer must be communicated between the parties before the offer is effective. One who makes an offer is called an offeror and the one accepting is called the offeree.

C. Duration of the Offer

The offer continues until: (1) there is a lapse of the time specified; (2) if no time is specified, by the lapse of a reasonable time; (3) the withdrawal by the offeror; or (4) the rejection by the offeree.

D. The Acceptance

An acceptance is an unqualified promise by the offeree that *(he) (she)* will be bound by the terms of the offer. The acceptance must be communicated to the offeror before the acceptance is effective. If the offer was received by *(mail) (telegram)* the acceptance is effective when it is deposited *(in the mail) (with the telegraph company)*.

E. Counter-Offer or Rejection

An acceptance which departs from the terms of the original offer by proposing new or additional terms is known as a counter-offer. A counter-offer rejects the original offer. If the counter-offer is accepted by the original offeror there is a binding contract.

Notes on Use

The applicable parts should be given when there is a dispute over the formation of a contract. If the contract involves the sale of personal property that is covered by the law of sales, codified under the Uniform Commercial Code, K.S.A. 84-2-101 *et seq.*, this pattern should not be given.

Comment

The suggested pattern is framed under traditional concepts of contract law. These concepts have been modified by the Uniform Commercial Code when it involves the sale of personal property.

The essential terms of an offer must be stated with sufficient degree of certainty as to be capable of enforcement. Essential terms are stated by Simpson, Handbook on the Law of Contracts (2d ed.) p 19 to include the following:

“Essential terms include identification of the subject matter, the price to be paid, the time of performance, or the work to be done. Missing terms such as price, or the time of delivery or completion, will be supplied where possible by an inference that a reasonable price, or delivery at a reasonable time was intended. However, such an inference is not possible where the offer or agreement attempts to cover these terms and fails to achieve intelligible certainty. In such case, the contract fails. Employment contracts lacking certainty as to the duration constitute an exception to the rule which invokes the standard of reasonableness.”

The essential elements of a contract under the Uniform Commercial Code or K.S.A. 84-2-201 were stated in *Southwest Engineering Co., Inc. v. Martin Tractor Co., Inc.*, 205 Kan. 684, 473 P.2d 18 (1970). For a general discussion of the requirements of definiteness and certainty of offers, see 17A Am. Jur. 2d, Contracts §§ 192 *et seq.*

The Kansas Supreme Court has consistently held that in order to form a binding contract there must be a meeting of the minds on all the essential terms. See *Phillips & Easton Supply Co., Inc. v. Eleanor International Inc.*, 212 Kan. 730, 512 P.2d 379 (1973); *Storts v. Eby Construction Co.*, 217 Kan. 34, 535 P.2d 908 (1975); and *Steele v. Harrison*, 220 Kan. 422, 552 P.2d 957 (1976). Yet, the omission of a single term is not necessarily fatal if conduct of the parties indicates there is an intent to be bound. *Arrowhead Construction Co. v. Essex Corp.*, 233 Kan. 241, 662 P.2d 1195 (1983). Also, the mere fact a contract contains blanks when signed does not make it invalid. However, it is a voidable contract if material parts are filled in an unauthorized manner. *Sidwell Oil & Gas Co. v. Loyd*, 230 Kan. 77, 630 P.2d 1107 (1981).

Two persons may fully agree upon the terms of the contract knowing that there are other matters on which they have not agreed and on which they expect further negotiations. Such an expectation does not prevent the agreement already made from being an enforceable contract. See *Storts v. Eby Construction Co.*, 217 Kan. 34, 535 P.2d 908 (1975). On the other hand, where the parties have negotiated with a definite understanding that no contract is to exist until execution of a written agreement, a binding contract does not come into existence until the written instrument is executed. See *Weil & Associates v. Urban Renewal Agency*, 206 Kan. 405, 479 P.2d 875 (1971).

An agreement to form a contract in the future is generally not binding unless all essential terms are agreed upon and nothing essential is left to future negotiations. *Mohr v. State Bank of Stanley*, 244 Kan. 555, 770 P.2d 466 (1989).

The determination of the existence of a sufficient meeting of the minds to form the basis for a binding contract is one of fact to be determined by the trier of the facts. *Care Display, Inc. v. Didde-Glaser, Inc.*, 225 Kan. 232, Syl. ¶ 3, 589 P.2d 599 (1979).

124.05

MISTAKE

A. Mutual Mistake

A party may be relieved of contractual responsibility if both parties made the same mistake concerning a basic assumption or material fact upon which the contract was based.

B. Unilateral Mistake

A party may be relieved of contractual responsibility if that party made a mistake concerning a basic assumption or material fact upon which the contract was based, and the other party to the contract (*knew of that mistake*) (*had reason to know of the mistake*) (*caused the mistake*).

Comment

In the case of *Geiger v. Hansen*, 214 Kan. 83, 519 P.2d 699 (1974), the Kansas Supreme Court acknowledged that there was authority for relieving a party of contractual duties involving a unilateral mistake if enforcement of the contract would effect substantial injustice. See also *Squires v. Woodbury*, 5 Kan. App. 2d 596, 621 P.2d 443 (1980).

A mutual mistake in a written contract is one made by all parties thereto. *Zuspann v. Roy*, 102 Kan. 188, 170 P. 387 (1918). A misunderstanding of the terms of a bargain by one party is insufficient to relieve that party from its terms. Relief can only be invoked upon a showing of mutual mistake, fraud, or want of authority. *Green v. Bankers' Life Ins. Co.*, 112 Kan. 50, 209 P. 670 (1922).

A contracting party is under a duty to learn the facts of a written contract before signing it, and if, without being a victim of fraud, he fails to read it, he signs the same at his peril. *Sutherland v. Sutherland*, 187 Kan. 599, 610, 358 P.2d 776 (1961); *Maltby v. Sumner*, 169 Kan. 417, 219 P.2d 395 (1950). Nonetheless, in *Andres v. Claassen*, 238 Kan. 732, 741, 714 P.2d 963, 969 (1986), the Kansas Supreme Court stated “... that an instrument may be reformed where there is ignorance or mistake on one side and fraud or inequitable conduct on the other.”

Although a person cannot read an instrument he has a duty to procure some reliable person to read and explain it. *Miner v. Farm Bur. Mut. Ins. Co., Inc.*, 17 Kan. App. 2d 598, 841 P.2d 1093 (1992).

Everyone is presumed to know the law and a mistake of law made by one party to the contract does not excuse that party from the obligations of the contract. *Flott v. Wenger Mixer Manufacturing Co.*, 189 Kan. 80, 367 P.2d 44 (1961). However, a mutual mistake of law can preclude formation of a contract. *Albers v. Nelson*, 248 Kan. 575, 809 P.2d 1194 (1991); *Rosenbaum v. Texas Energies, Inc.*, 241 Kan. 295, 736 P.2d 888 (1987).

Either party may prove mistake and have reformation of the contract. *Geiger v. Hansen*, 214 Kan. 83, 519 P.2d 699 (1974).

However, the successful bidder for a public construction contract will not be granted equitable relief, by way of cancellation of the construction bid and the discharge and relief from its bid bond, because of a unilateral error in calculating costs. *Triple A Contractors, Inc. v. Rural Water Dist. No. 4*, 226 Kan. 626, Syl. ¶ 1, 603 P.2d 184 (1979).

Where suit is brought for performance of a written contract, parol evidence is admissible to show that there was no consent to the agreement by reason of mutual mistake. *Sidwell Oil & Gas Co. v. Loyd*, 230 Kan. 77, 630 P.2d 1107 (1981).

A provision in a written contract which provides that time is of the essence may be nullified where mutual mistake or fraud is established. *Campbell v. Fowler*, 214 Kan. 491, 497, 520 P.2d 1285 (1974).

A mistake justifying rescission need not be mutual, but a unilateral mistake by one party justifies relief if the mistaken fact goes to the basis of the transaction and was known by the other party. *Potucek v. Cordeleria Lourdes*, 310 F.2d 527 (10th Cir. 1962), *cert. denied* 372 U.S. 930, 83 S. Ct. 875, 9 L. Ed. 2d 734 (1963).

For a party to be successful in a claim of mutual mistake, the mistake must be as to a past or present fact material to the contract and not a mere mistake in prophecy, opinion or belief relative to an uncertain event. *Krantz v. University of Kansas*, 271 Kan. 234, 244, 21 P.3d 561 (2001).

124.06**FORMATION OF CONTRACTS—INTOXICATED PERSON**

A party may be relieved of *(his) (her)* contract responsibility by reason of intoxication only if the following are proven:

- 1. that *(he) (she)* was intoxicated at the time the contract was signed;**
- 2. that during this time *(he) (she)* lacked the power to reason and comprehend the nature and consequences of *(his) (her)* act(s); and**
- 3. that the other *(party) (parties)* to the contract knew or had reason to know that *(he) (she)* was unable to understand the nature and consequences of *(his) (her)* act(s).**

Comment

In *Curry v. Stewart*, 189 Kan. 153, 156, 368 P.2d 297 (1962), the court stated that “an habitual drunkard is not necessarily incompetent as a matter of law, and, in the absence of an adjudication finding an habitual drunkard to be incompetent, in order to avoid his contract or deed on the ground of his incompetency it must be shown that his mental condition was such at the time the contract or deed was made that he lacked the power of reason and was unable to comprehend the nature and consequences of his act in entering into the contract or executing the deed.” See also *In re Estate of Crawford*, 176 Kan. 537, 541, 271 P.2d 240 (1954), and *Mills v. Shepherd*, 159 Kan. 668, 157 P.2d 533 (1945).

124.07

FORMATION OF CONTRACT—DURESS

A party may be relieved of *(his) (her)* contractual responsibility if *(he) (she)* became a party to the transaction while under duress. Duress is any wrongful threat, by words or other conduct, which was intended or should reasonably have been expected to cause such fear as to deny the threatened party the exercise of free will and judgment in *(his) (her)* decision to enter into a transaction. The test is whether or not the threat put the party in such fear that *(he) (she)* could not exercise free will and judgment.

Comment

Although the ultimate question regarding the existence or nonexistence of free will is a matter for jury determination, the court must initially conclude that the evidence submitted to establish duress is substantial. *Motor Equipment Co. v. McLaughlin*, 156 Kan. 258, 266, 133 P.2d 149 (1943).

The statute of limitations does not begin to run in an action for relief on the ground of duress by threats while the mind of the aggrieved party continues to be dominated by such threats. *Eureka Bank v. Bay*, 90 Kan. 506, 509, 135 P. 584 (1913).

It is not duress for one to threaten the use of the law to its full extent against another. *Riney v. Doll*, 116 Kan. 26, 225 P. 1059 (1924).

For discussion of the elements of duress and the burden of proof, see *Libel v. Libel*, 5 Kan. App. 2d 367, 616 P.2d 306 (1980).

When the party alleging duress is a corporation, duress of one corporate representative does not necessarily equate to duress of the corporation. When corporate action requires the vote of more than one corporate representative, duress of one of the corporate representatives does not necessarily mean that the other corporate representatives are under duress, or that the corporation as a plaintiff or defendant cannot exercise free will and judgment. However, the representative acting under duress may influence the other representatives, such that they and the corporation are also acting under duress. *McConwell v. FMG of Kansas City, Inc.*, 18 Kan. App. 2d 839, 855, 861 P.2d 830 (1993).

124.08

FORMATION OF CONTRACTS—LACK OF CAPACITY

A party may be relieved of *(his) (her)* contractual responsibility by reason of mental illness or defect if *(he) (she)* failed to possess sufficient mind to understand in a reasonable manner the nature and effect of the act in which *(he) (she)* was engaged.

Notes on Use

This instruction should be given when there is an issue of fact as to the lack of capacity of a party.

124.09

FORMATION OF CONTRACTS—UNDUE INFLUENCE

A party may be relieved of *(his) (her)* contractual responsibility by reason of undue influence if *(he) (she)* was deprived of *(his) (her)* free will or agency to contract, and the will of another was substituted in its place.

In determining whether there was undue influence, you should consider all the circumstances, including:

- **the relationship of the parties;**
- **the timing and manner of the suggestion, advice, or other pressure;**
- **the motive for the suggestion, advice, or other pressure; and**
- **the effect of the suggestion, advice, or other pressure.**

Fair argument and persuasion do not amount to undue influence.

Notes on Use

The instruction should be given when the defense of undue influence is claimed. If the claim of undue influence is based on a confidential or fiduciary relationship this instruction should not be given. In that case, PIK 4th 124.10 should be used. If the defense of independent advice is asserted, PIK 4th 124.11 should be given.

Comment

Authority for the instruction is found in *Smith v. McHenry*, 111 Kan. 659, 663, 207 P. 1108 (1922); *Linn v. Blanton*, 111 Kan. 743, 208 P. 616 (1922); 25 Am. Jur. 2d, Duress and Undue Influence § 31.

In the absence of a confidential or fiduciary relationship, the burden of proof on the claim of undue influence is upon the party asserting it. Williston on Contracts p 1626. Where a confidential relationship is shown to exist, the burden of proof is upon the confidant to show by convincing evidence that no undue influence was exercised. *In re Estate of Carlson*, 201 Kan. 635, 648, 443 P.2d 339 (1968).

“Whether a contracting party has been unduly influenced presents a question of fact turning upon the particulars of the transaction. Undue influence requires that degree of pressure sufficient to overpower the party’s free will. A fact-finder should consider all the circumstances, including the relationship of the parties; the timing and manner of suggestion, advice, or other pressure; the motive for applying that pressure; and the effect of the pressure.” *Moore v. Moore*, 56 Kan. App. 2d 301, Syl. ¶ 5, 429 P.3d 607 (2018), *rev. denied* 309 Kan. 1348 (2019).

The defense of undue influence is commonly asserted in will contests. See *Ginter v. Ginter*, 79 Kan. 721, 101 P. 634 (1909); *In re Estate of Hall*, 165 Kan. 465, 195 P.2d 612 (1948); *In re Estate of Crawford*, 176 Kan. 537, 271 P.2d 240 (1954); *In re Estate of Carlson*, 201 Kan. 635, 443 P.2d 339 (1968), and a number of cases found in Hatcher’s Kansas Digest, Vol. 5, Wills 78, 80. To invalidate a will, undue influence must amount to coercion, compulsion, or constraint which destroys a person’s free agency and overcomes the power of resistance. The influencer must also bear directly on the person’s actions and

particular parties must benefit as a result of the pressure. *In re Estate of Koch*, 18 Kan. App. 2d 188, 849 P.2d 977 (1993). However, the law of Kansas does not provide for jury trial in will contests. *Evans v. Evans*, 109 Kan. 608, 201 P. 60 (1921); *Sharp v. Losee*, 109 Kan. 211, 199 P. 94 (1921); *Cole v. Drum*, 109 Kan. 148, 197 P. 1105 (1921). In a will contest the jury is merely advisory and the court is bound to follow its own judgment. *Maddy v. Hock*, 134 Kan. 15, 4 P.2d 408 (1931).

124.10

**FORMATION OF CONTRACTS—CONFIDENTIAL OR
FIDUCIARY RELATIONSHIP—UNDUE INFLUENCE—BURDEN
OF PROOF**

A party may be relieved of *(his) (her)* contractual responsibility by reason of undue influence if *(he) (she)* was deprived of *(his)(her)* free will or agency to contract, and if the will of another was substituted in its place. In this case insert name of allegedly dominated party claims that a confidential or fiduciary relationship existed between insert name of allegedly dominated party and insert name of allegedly dominating party, and that *(he)(she)* was unduly influenced by insert name of allegedly dominating party.

1. [You must determine whether a “confidential or fiduciary relationship” existed between the parties. In determining whether a confidential or fiduciary relationship existed you should consider all the facts and circumstances of the relationship.]

A confidential or fiduciary relationship is any relationship of blood, business, friendship or association in which one of the parties places special trust and confidence in the other.

A confidential or fiduciary relationship exists in a case in which there has been a special confidence placed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one placing the confidence.

2. *(Because the court found as a matter of law there was a confidential or fiduciary relationship,) (If you find that a confidential or fiduciary relationship existed,) insert name of allegedly dominated party is relieved of *(his)(her)* contractual responsibility unless you are persuaded that insert name of allegedly dominated party was not unduly influenced by insert name of allegedly dominating party. Insert name of allegedly dominating party has the burden to prove the absence of undue influence.*
- [3. If you do not find that a confidential or fiduciary relationship existed, insert name of allegedly dominated party has the burden to prove undue influence to be relieved of *(his)(her)* contractual responsibility.]

3. or 4. In determining whether there was undue influence you should consider all the circumstances, including:

- **the relationship of the parties;**
- **the timing and manner of the suggestion, advice, or other pressure;**
- **the motive for the suggestion, advice or other pressure; and**
- **the effect of the suggestion, advice or other pressure.**

Fair argument and persuasion do not amount to undue influence.

Notes on Use

For authority, see *Moore v. Moore*, 56 Kan. App. 2d 301, 429 P.3d 607 (2018), *rev. denied* 309 Kan. 1348 (2019).

The name of the allegedly dominated or dominating party should be inserted where applicable.

This instruction should be given in a case in which there is a claim of undue influence and: 1) the court finds as a matter of law that a fiduciary or confidential relationship existed, or 2) the existence of a fiduciary or confidential relationship is a question of fact for the jury.

This instruction should not be given if the court finds as a matter of law that no fiduciary or confidential relationship existed. In that case, PIK 4th 124.09 should be given.

If the court determines as a matter of law that there was a fiduciary or confidential relationship, the bracketed paragraph in Element 1 and the bracketed Element 3 should not be given. Bracketed Element 3 should be given only when the second parenthetical in Element 2 is selected.

Comment

“When parties occupy a confidential relationship, the courts require the trusted party to prove the absence of undue influence over the trusting party in bargaining and contract formation.” *Moore v. Moore*, 56 Kan. App. 2d 301, Syl. ¶ 2, 429 P.3d 607 (2018), *rev. denied* 309 Kan. 1348 (2019). “In a will contest, unlike a contract dispute, the burden to prove the absence of undue influence shifts to a legatee only when he or she occupied a confidential relationship with the testator and the bequest invites suspicion.” *Moore*, Syl. ¶ 3. “Kansas appellate courts have declined to fashion an overarching definition of confidential relationships and defer, instead, to an inquiry into the particular facts of a given case.” *Moore*, Syl. ¶ 4. “Whether a contracting party has been unduly influenced presents a question of fact turning upon the particulars of the transaction. Undue influence requires that degree of pressure sufficient to overpower the party’s free will. A fact-finder should consider all the circumstances, including the relationship of the parties; the timing and manner of suggestion, advice, or other pressure; the motive for applying that pressure; and the effect of the pressure.” *Moore*, Syl. ¶ 5.

When a confidential relationship is shown to exist between parties to a contract, a presumption of undue influence is established. The burden of proof shifts to the confidant to show that the contract was made in good faith and was not induced by undue influence. *Henks v. Panning*, 175 Kan. 424, 264 P.2d 483 (1953); *In re Estate of Crawford*, 176 Kan. 537, 541, 271 P.2d 240 (1954).

Kansas appellate courts have used the terms “fiduciary” and “confidential” relationships interchangeably. For example, in its discussion of the parties’ relationship in *Moore v. Moore*, *supra*, the

Court of Appeals cited both *Brown v. Foulks*, 232 Kan. 424, 430-31, 657 P.2d 501 (1983), and *Nelson v. Nelson*, 38 Kan. App. 2d 64, 78 (2007), *aff'd* 288 Kan. 570, 205 P.3d 715 (2009). In *Brown*, the Supreme Court held that the term “fiduciary relation” refers to “any relationship of blood, business, friendship, or association in which one of the parties reposes special trust and confidence in the other who is in a position to have and exercise influence over the first party.” In *Nelson*, the Court of Appeals used identical language to define a “confidential relationship.”

In *In re Estate of Carlson*, 201 Kan. 635, 648, 443 P.2d 339 (1968), the Supreme Court of Kansas stated that “[c]ourts view with suspicion gifts or contracts between parties occupying a confidential or fiduciary relationship and will scrutinize them closely and rescind or cancel them unless the one claiming thereunder shows by convincing evidence there was no restraint or undue influence or undue advantage obtained, and that there was good faith on his part.”

The relationships that commonly fall within the rule are those of parent and child; guardian and ward; husband and wife; physician and patient; attorney and client; and clergyman and parishioner. See Restatement (Second) of Contracts § 177 comment a. However, the mere existence of a parent and child relationship is not enough to establish a confidential relationship. *In re Estate of Koch*, 18 Kan. App. 2d 188, 849 P.2d 977 (1993). For discussion of the elements to consider in determining whether a confidential relationship exists, see *In re Adoption of Irons*, 235 Kan. 540, 684 P.2d 332 (1984).

124.11

**FORMATION OF CONTRACTS—UNDUE INFLUENCE—
DEFENSE OF INDEPENDENT ADVICE**

It is a defense to a claim of undue influence that _____ (*insert name of allegedly dominated person*) received independent advice from a person who was both qualified to give the advice and had no personal interest in the outcome of the transaction.

Notes on Use

This instruction should be used when a party claims that the allegedly dominated person received independent advice in the exercise of his or her free will. See the Notes on Use and Comment in PIK 4th 124.09, Formation of Contracts—Undue Influence, and 124.10, Formation of Contracts—Confidential or Fiduciary Relationship—Undue Influence—Burden of Proof.

Comment

In *In re Estate of Carlson*, 201 Kan. 635, 648-49, 443 P.2d 339 (1968), the Supreme Court of Kansas held that “the rule of independent advice is applied only under circumstances where the evidence warrants it [and that it is not required] where the party upon whom is cast the burden of showing good faith presents substantial evidence that the deed or contract was made in good faith, not induced by undue influence, and for a valuable consideration.” See also *In re Estate of Relihan*, 4 Kan. App. 2d 277, 604 P.2d 1219 (1980).

The Supreme Court of Kansas defined the term “independent advice” in *Flintjer v. Rehm*, 120 Kan. 13, 17, 241 P. 1087 (1926), to mean “that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was, furthermore, so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidentially as to the consequences to himself of his proposed benefaction.”

124.12

CONSIDERATION

For a promise to be legally enforceable, something of value must be bargained for and given in exchange for the promise. This is called consideration.

“Something of value” may consist of a promise (*such as a promise to pay money or to perform services or to deliver goods*), an act (*such as the payment of money, the delivery of goods, or the performance of services*), or a forbearance (*such as forbearance to sue, to compete, to promise, or to act*).

Notes on Use

This instruction need not be given unless there is a dispute about the existence of consideration.

K.S.A. 16-107 provides that all contracts in writing signed by the party bound thereby, or his authorized agent or attorney, shall import a consideration. K.S.A. 16-108 provides that the want or failure of consideration may be shown as a defense.

Comment

If a contract is in writing, there is a presumption that consideration exists. If lack of consideration is asserted in such circumstances, substantial evidence will be needed to overcome the presumption. *State ex rel. Ludwick v. Bryant*, 237 Kan. 47, 697 P.2d 858 (1985). See K.S.A. 16-107 and 16-108. Where the existence of consideration for a contract is controverted, the issue must be submitted to the jury unless the parties consent to a decision by the court. *Ferraro v. Fink*, 191 Kan. 53, 56, 379 P.2d 266 (1963); *Fieser v. Stinnett*, 212 Kan. 26, 33, 509 P.2d 1156 (1973).

Want of consideration for a contract in writing is an affirmative defense, and the burden of proof is upon him who asserts it. *Boner v. Texas Co.*, 143 Kan. 746, 57 P.2d 420 (1936).

Consideration has been defined as any benefit, profit, or advantage flowing to the promisor which he would not have received but for the contract, or any loss or detriment to the promisee. *State Investment Co. v. Cimarron Insurance Co.*, 183 Kan. 190, 195, 326 P.2d 299 (1958); *Temmen v. Kent-Brown Chevrolet Co.*, 217 Kan. 223, 231, 535 P.2d 873 (1975). If consideration is sufficient, it does not matter whether it is given by a promisee or a third party. *Boos v. National Fed’n of State High School Ass’ns*, 20 Kan. App. 2d 517, 889 P.2d 797 (1995).

While want of consideration usually indicates a total lack of consideration at the time of formation, and failure indicates nonperformance later [17A Am. Jur. 2d, Contracts § 670], “failure of consideration” is sometimes treated as meaning the same as “want of consideration.” *Karl v. Maloney*, 111 Kan. 93, 205 P. 1037 (1922).

Detriment means giving up a valuable right the promisee was privileged to have or retain.

124.13

PROMISSORY ESTOPPEL

A promise that the promisor should reasonably expect to induce, and does induce, action or forbearance of a definite and substantial character on the part of the promisee is binding if injustice can be avoided only by enforcement of the promise.

Comment

The doctrine of promissory estoppel is a substitute for consideration. It finds application in family settlement agreements, promises to convey land, and the like. It differs from ordinary equitable estoppel in that the representation is promissory rather than to existing fact. *Marker v. Preferred Fire Ins. Co.*, 211 Kan. 427, 434, 506 P.2d 1163 (1973). Furthermore, it requires less proof than an action based on a fraudulent promise of future events. See PIK 4th 127.42, Fraud—Promise of Future Events.

The doctrine is recognized in *In re Estate of Shirk*, 186 Kan. 311, 321, 350 P.2d 1 (1960); *French v. French*, 161 Kan. 327, 331, 167 P.2d 305 (1946), *cert. denied* 329 U.S. 727, 67 S. Ct. 81, 91 L. Ed. 629 (1946); and *Greiner v. Greiner*, 131 Kan. 760, 765, 293 P. 759 (1930).

Before the doctrine may be invoked, the evidence must show: (1) that the promisor reasonably expected the promisee to rely on the promise, (2) that the promisee acted reasonably in reliance, and (3) that refusal to enforce the promise would result in fraud or injustice. *Marker v. Preferred Fire Ins. Co.*, 211 Kan. 427, 506 P.2d 1163; *Berryman v. Kmoch*, 221 Kan. 304, 559 P.2d 790 (1977); *Patrons Mutual Ins. Ass'n v. Union Gas System, Inc.*, 250 Kan. 722, 830 P.2d 35 (1992); *Mohr v. State Bank of Stanley*, 244 Kan. 555, 770 P.2d 466 (1989).

The phrases “enforcement of a promise because of reliance,” “action-in-reliance,” and “promissory estoppel” are used synonymously with reference to the rule articulated in Restatement of Contracts § 90 (1932). *Kirkpatrick v. Seneca National Bank*, 213 Kan. 61, 68, 515 P.2d 781 (1973).

Promissory estoppel may be used to enforce a promise otherwise unenforceable by operation of the statute of frauds. *Decatur Cooperative Association v. Urban*, 219 Kan. 171, 547 P.2d 323 (1976); *Walker v. Ireton*, 221 Kan. 314, 559 P.2d 340 (1977). Before promissory estoppel can be invoked in a case involving the Statute of Frauds, the promise must show a valid and otherwise enforceable contract was entered into by the parties. *Owasso Dev. Co. v. Associated Wholesale Grocers, Inc.*, 19 Kan. App. 2d 549, 873 P.2d 212 (1994).

124.14

CONSTRUCTION OF CONTRACTS

Comment

No instruction has been provided. The Committee recommends that in every contract case the court describe the contract between the parties as simply as possible and then define the issues of fact arising out of the alleged breach.

124.15

JOINT CONTRACTS

When two or more persons have joined in obligating themselves by contract, each person is wholly liable. The obligation may be enforced against any one or more of such persons. (*The release of any one of such persons does not release the others from the obligation, except as to the amount paid for the release.*)

Notes on Use

This instruction is not applicable when the obligation involved is several only. The parenthetical expression should be used when the evidence indicates that other obligors have been released.

K.S.A. 16-101 provides that all contracts that by the common law are joint only shall be construed to be joint and several.

K.S.A. 16-102 and 103 provide for the survivorship of joint obligations in case of the death of one or more of the joint obligors.

K.S.A. 16-104 provides that in all cases of joint obligations, suits may be brought against any one or more of those who are so liable.

K.S.A. 16-105 provides that any person jointly or severally liable with others for the payment of any debt may be released from such liability by the creditor, and such release shall not discharge the other obligors beyond the proper proportion of the debt for which the person released was liable.

K.S.A. 84-3-116(a), relating to negotiable instruments, provides that when more than one party signs an instrument in a particular capacity, such as maker, acceptor, drawer, or endorser, all such signing parties are jointly and severally liable in that capacity unless the instrument provides otherwise. See also K.S.A. 84-3-402, relating to the obligation of one signing commercial paper in a representative capacity.

Comment

In *Misco Leasing, Inc. v. Bush*, 208 Kan. 45, 490 P.2d 367 (1971), the Supreme Court of Kansas held that “[t]he theory of joint and several liability is that it is the obligation of all jointly and the obligation of each separately. K.S.A. 16-105 cannot apply when each of the parties are liable for the whole of the indebtedness.”

When debtors are jointly and severally liable on an obligation, the release of one debtor discharges the remaining debtors only to the extent of the consideration paid for the release. *Bazine State Bank v. Pawnee Prod. Serv., Inc.*, 245 Kan. 490, 781 P.2d 1077 (1989).

124.16

MEASURE OF DAMAGES FOR BREACH OF CONTRACT

If you find for insert name of party, then you should award insert name of party the sum you find will fairly and justly compensate insert name of party for the damages you find were sustained as a direct result of the breach of contract by insert name of party.

In determining insert name of party's damages you should consider any of the following elements of damage that you find were the result of the breach: _____ (*List here the elements of damage claimed*)

The total amount of your verdict may not exceed the sum of \$_____, the amount of insert name of party's claim.

Notes on Use

The court should determine as a matter of law the elements of damage that are properly recoverable under the evidence, and each element should be listed. *Jenkins v. Kirtley*, 70 Kan. 801, 79 P. 671 (1905).

PIK 4th 171.40, Measure of Damages—Personal or Property—Short Form, with slight modification, may also suffice in breach of contract actions.

With reference to actions for breach of sales contracts, see K.S.A. 84-2-701 through 725.

Comment

Damages recoverable for breach of contract are limited to those damages which may fairly be considered as arising, in the usual course of things, from the breach, or as may reasonably be assumed to have been within the contemplation of both parties as the probable result of the breach. Damages that are not the result of the breach, and those which are remote, cannot serve to support a judgment. *Kansas State Bank v. Overseas Motorsport, Inc.*, 222 Kan. 26, 27, 563 P.2d 414 (1977), and the cases cited therein. This is the doctrine of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Reprint 145, 5 Eng. Rul. Cas. 502 (1854). See Restatement (Second) of Contracts § 351; *Enlow v. Sears, Roebuck and Co.*, 249 Kan. 732, 822 P.2d 617 (1991).

If the agreement contains provisions fixing the measure of recovery in case of breach, such provisions are controlling. *Anderson v. Rexroad*, 180 Kan. 505, 306 P.2d 137 (1957); *Kvassay v. Murray*, 15 Kan. App. 2d 426, 808 P.2d 896 (1991); and see K.S.A. 84-2-718, 719. An exception to this rule exists concerning stipulations for liquidated damages that have little or no relation to actual damages. Where a stipulated amount of damages to be paid for a breach of contract does not bear a reasonable relationship to the damages that may be expected to follow from the breach, such stipulated sums will be construed to be "penalties." *National Coop Refinery Ass'n v. Northern Ordnance, Inc.*, 238 F.2d 803 (10th Cir. 1956).

A party who is injured by a breach of a contract is entitled to compensation for the injury sustained, and is to be placed, so far as it can be done by a money award, in the same position he would have occupied if the contract had been performed. *Steel v. Eagle*, 207 Kan. 146, 151, 483 P.2d 1063 (1971).

Loss of profits resulting from a breach of contract may be recovered as damages when such profits are proved with reasonable certainty and when they may reasonably be considered to have been within the contemplation of the parties. *Vickers v. Wichita State University*, 213 Kan. 614, 518 P.2d 512 (1974);

Butler v. Westgate State Bank, 226 Kan. 581, 602 P.2d 1276 (1979); *Zenda Grain & Supply Co. v. Farmland Industries, Inc.*, 20 Kan. App. 2d 728, 894 P.2d 881 (1995).

Where there is no uncertainty as to the amount which is due under a contract or the date on which it became due, the creditor is entitled to recover interest from the due date. *Arrowhead Constr. Co. v. Essex Corp.*, 233 Kan. 241, 662 P.2d 1195 (1983).

When a personal services contract is breached, the aggrieved party may recover the cost of obtaining equivalent service plus any foreseeable consequential costs of the breach, reduced by the amount of wages that remain unpaid to the breaching party. *Source Direct, Inc. v. Mantell*, 19 Kan. App. 2d 399, 870 P.2d 686 (1994).

124.17

MEASURE OF DAMAGES UNDER QUANTUM MERUIT

Where a party furnishes goods or performs services for another and has a reasonable expectation of being compensated, the one benefited is responsible for paying the reasonable worth of the goods provided or services rendered.

Plaintiff claims to have provided the following goods or services:

(State elements of plaintiff's claim.)

The total amount of your award may not exceed the sum of \$ _____, the amount of the plaintiff's claim.

Notes on Use

For authority, see *Sharman v. Webber Supply Co.*, 201 Kan. 507, 441 P.2d 867 (1968).

Comment

Where a contract is terminated or abandoned after partial performance, the doctrine of quantum meruit may be applicable. *Sharman v. Webber Supply Co.*, 201 Kan. 507, 441 P.2d 867 (1968).

The elements of quantum meruit are: a benefit conferred on the defendant by the plaintiff, an appreciation or knowledge of the benefit by the defendant, and acceptance or retention of the benefit by the defendant under circumstances in which such acceptance or retention is not equitable without payment for its value. *Haz-Mat Response, Inc. v. Certified Waste Services, Ltd.*, 21 Kan. App. 2d 56, 896 P.2d 393 (1995), *aff'd in part and rev'd in part* 259 Kan. 166, 910 P.2d 839 (1996).

Where there is no evidence showing that services were to be gratuitous, there is an implied promise to pay for accepted service. *Brakensiek v. Shaffer*, 203 Kan. 817, 457 P.2d 511 (1969).

Where the minds of the parties do not meet on the essential terms of the contract, the party who furnished material or rendered services to the other party, relying on the terms as he understood them, is entitled to recover the reasonable worth of material and services. *Campbell-Leonard Realtors v. El Matador Apartment Co.*, 220 Kan. 659, 556 P.2d 459 (1976).

A party who contracts with a city cannot recover under quantum meruit when the city officials that created the contract did so without the authority necessary to enter such a contract. *Blevins v. Board of Douglas County Comm'rs*, 251 Kan. 374, 834 P.2d 1344 (1992).

124.18

MITIGATION OF LOSS

If you find that the plaintiff is entitled to recover damages for breach of the contract, then in fixing the amount of damages you should not include any loss that *(he) (she) (it)* could have prevented by reasonable care and diligence.

Notes on Use

One claiming damages for breach of contract has the same duty to mitigate his loss as does a tort claimant. See PIK 4th 171.42, Duty to Mitigate Damages.

For provisions relating to sales cases, see K.S.A. 84-2-706 through 84-2-712.

Comment

In *Cain v. Grosshans & Petersen, Inc.*, 196 Kan. 497, 413 P.2d 98 (1966), the Supreme Court stated that “[w]here a party has been injured by a breach of contract he has a duty to minimize his loss to the extent reasonably possible under existing circumstances. We acknowledge this as the general rule in Kansas.”

In *Theis v. duPont, Glore Forgan, Inc.*, 212 Kan. 301, 307, 510 P.2d 1212 (1973), the Supreme Court qualified the use of the term “duty” and held that “[t]he rule, more properly stated, is simply that damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense or humiliation.” Yet, expenses of a reasonable, but unsuccessful, effort to mitigate loss are recoverable. Evidence of the failure of a claimant to take reasonable action to mitigate his loss may be shown in reduction of damages. See Restatement (Second) of Contracts § 350.

In Kansas, mitigation of damages is an affirmative defense, the establishment of which devolves upon the party asserting it. *Rockey v. Bacon*, 205 Kan. 578, 583, 470 P.2d 804 (1970).

In an action brought to recover damages for nondelivery and repudiation of a contract for sale, where no evidence was offered of any attempt to cover, the correct measure of damages was the difference between the market price at the time the buyer learned of the breach and the contract price. *Panhandle Agri-Service, Inc. v. Becker*, 231 Kan. 291, 644 P.2d 413 (1982).

“Cover,” as used in the U.C.C., is explained in K.S.A. 84-2-712 as the buyer’s procurement of substitute goods when the seller repudiates or fails to deliver. The buyer need not “cover,” but if he fails to attempt to cover, consequential damages, including lost profits, cannot be recovered. *Panhandle Agri-Service, Inc. v. Becker*, 231 Kan. 291, 644 P.2d 413 (1982).

124.19

CONTRACTS BY MINORS**A. Generally**

A contract by a minor is valid [unless you find that it has been disaffirmed by (him) (her)].

B. Disaffirmance

A contract made by a minor may be avoided by (him) (her) within a reasonable time after [(he) (she)] [(reaches the age of majority) (comes of age)], if (he) (she):

1. notifies the other party of (his) (her) disaffirmance of the contract by some positive act or statement, and
2. restores, or offers to restore, to the other party all money or property received by (him) (her) under the contract which was within (his) (her) control at any time after (he) (she) reaches the age of majority.

A person reaches the age of majority when (he) (she) becomes 18 years of age.

Whether _____ (insert name of minor)

- [disaffirmed the contract within a reasonable time after he came of age]
- [performed some positive act or made some positive statement of disaffirmance]
- [restored or offered to restore to _____ (insert name of other party) all property received by (him) (her) under the contract, which was within (his) (her) control at any time after (he) (she) reached the age of majority]

are questions of fact for you to determine.

Notes on Use

Under K.S.A. 74-32,251, certain student loans for higher education may not be disaffirmed because of minority.

Under the rules of statutory construction set forth in K.S.A. 77-201, when used in the statute, the phrase “under legal disability” includes persons who are within the period of minority, or who are incapacitated, incompetent or imprisoned.

“Minor” means any person defined by K.S.A. 38-101 as being within the period of minority. It should be noted that pursuant to K.S.A. 38-101 a person 16 years of age or older who is or has been married shall be considered of the age of majority for the purposes of contract obligations.

Comment

A minor's contract is never void, unless it is void for some reason other than minority. It is merely voidable, and is valid unless disaffirmed within a reasonable time after majority is attained. If a contract is for necessities, it may not be disaffirmed. Private transportation to and from work is necessary, and contracts therefore, such as where parties have agreed to share a ride, may not be disaffirmed. *Ehram v. Borgen*, 185 Kan. 776, 778, 779, 347 P.2d 260 (1959).

Disaffirmance must be signified not only by refraining from any act of affirmance, but by performing some positive act of disaffirmance which is of such a character as to show clearly an intention not to be bound by the contract. What constitutes a reasonable time is a question of fact; a disaffirmance coming more than five years after attaining majority, and more than five years after the cause of action arose, comes too late. *Brown v. Staab*, 103 Kan. 611, 176 P. 113 (1918). The filing of an action against an insurer to recover under an uninsured motorist clause of an automobile policy can be equivalent to an implied disaffirmance of an arbitration provision contained in the policy. *Dickson v. Hoffman*, 305 F. Supp. 1040 (D. Kan. 1969).

Where the evidence is conflicting, the trier of fact must determine whether the other party had good reasons to believe the minor was an adult. *Pottawatomie Airport & Flying Service, Inc. v. Winger*, 176 Kan. 445, 271 P.2d 754 (1954).

124.20

SUBSTANTIAL PERFORMANCE

A party who acts in good faith and who performs substantially all that is required of *(him) (her)* by a contract may recover from the other party the contract price *(less any damage sustained by the other party for minor defects in performance)*.

Comment

Whether a party has substantially performed a promise under a contract is a question of fact to be determined from the circumstances of each case. “Substantial performance” of a contract does not contemplate exact performance of every detail, but rather performance of all important parts. *Almena State Bank v. Enfield*, 24 Kan. App. 2d 834, Syl. ¶ 4, 954 P.2d 724 (1998).

124.21

PERFORMANCE PREVENTED BY PARTY

Between parties to a contract, prevention of performance constitutes a breach. Where one party to a contract prevents complete performance of the contract by the other party, the other party is excused from the remainder of (his) (her) duties under the contract, and (he) (she) may recover (for the work [he] [she] has performed) (any damages which [he] [she] has sustained as a direct result of the breach).

Whether the defendant prevented the plaintiff from performing fully all of (his) (her) obligations under the contract is a question of fact for you to determine from the evidence.

Comment

A party to a contract cannot prevent performance by another and derive any benefit, or escape any liability, from his own failure to perform a necessary promissory condition that prevents the completion of the transaction. *Wallerius v. Hare*, 194 Kan. 408, 399 P.2d 543 (1965); *Talbott v. Nibert*, 167 Kan. 138, 206 P.2d 131 (1949); and *Sharman v. Webber Supply Co.*, 201 Kan. 507, 515, 441 P.2d 867 (1968).

A party to a contract will not be permitted, in the absence of justifiable cause, to interfere, hinder, or prevent performance by an adverse party and claim benefits or escape liability on the ground of nonperformance. *Briney v. Toews*, 150 Kan. 489, 95 P.2d 355 (1939). However, prevention of performance is not a breach when the contract has been properly terminated. *Morton Bldgs., Inc. v. Department of Human Resources*, 10 Kan. App. 2d 197, 695 P.2d 450 (1985).

124.22

MODIFICATION

A contract may be modified or changed by a later oral or written (agreement) (contract). Whether or not the parties to this action have modified or changed the original contract is for you to determine.

Notes on Use

This instruction should be given when there is an issue of fact over the modification of an existing contract.

Comment

The terms of a written contract may be varied, modified, waived, annulled, or wholly set aside by a subsequent contract, whether oral or written. *Gibbs v. Erbert*, 198 Kan. 403, 412, 424 P.2d 276 (1967).

Modification requires the assent of all parties to the contract. Mutual assent may be shown by an express agreement, or may be implied from the circumstances and conduct of the parties. *Fast v. Kahan*, 206 Kan. 682, 684, 481 P.2d 958 (1971).

The intent of the parties to modify a contract may be implied from the conduct of the parties if they do not continue to act according to the terms of the original contract. *Galindo v. City of Coffeyville*, 256 Kan. 455, 885 P.2d 1246 (1994).

Mutuality is required to amend the terms of a contract and one party cannot unilaterally change its terms. *Gill Mortuary v. Sutoris Inc.*, 207 Kan. 557, 562, 485 P.2d 1377 (1971); *Dickens v. Snodgrass, Dunlap & Co.*, 255 Kan. 164, 872 P.2d 252 (1994).

As a general rule, consideration is required for contracts of modification. *Frogge v. Belford*, 168 Kan. 74, 211 P.2d 49 (1949), *adhered to* 168 Kan. 582, 215 P.2d 200 (1950); *Bloch v. Fedak*, 210 Kan. 63, 65, 499 P.2d 1052 (1972); *Augusta Medical Complex, Inc. v. Blue Cross*, 227 Kan. 469, 474, 608 P.2d 890 (1980).

K.S.A. 84-2-209 provides that there need be no consideration for an agreement modifying a contract which is governed by Article 2 of the Kansas Uniform Commercial Code; that a signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified; that contracts, or modifications of contracts, involving goods of the price of \$500.00 or more must be evidenced by some writing; and that although an attempt to modify or rescind does not satisfy the specified requirements, it may in certain circumstances operate as a waiver.

The scope of the applicability of this section remains to be determined; but in all cases involving sales contracts, or where there is a written contract prohibition against oral modification, this statute should be given careful study.

Although the terms of a written contract may not be altered by a contemporaneous parol agreement, they may be varied, modified, waived, annulled, or wholly set aside by a subsequent contract, either written or parol. *Owens v. City of Bartlett*, 215 Kan. 840, 528 P.2d 1235 (1974); and *Coonrod & Walz Constr. Co., Inc. v. Motel Enterprises, Inc., et al.*, 217 Kan. 63, 73, 535 P.2d 971 (1975).

For problems relating to the necessity for a modifying agreement to be in writing if the original contract was subject to the provisions of the Statute of Frauds, see *Riffel v. Dieter*, 159 Kan. 628, 157 P.2d 831 (1945); 73 Am. Jur. 2d, Statute of Frauds §§ 274-281; Restatement (Second) of Contracts §§ 148-150;

Hoard v. Jones, 119 Kan. 138, 237 P. 888 (1925); *Jones v. Jones*, 161 Kan. 284, 167 P.2d 634 (1946); *Stambaugh v. Silverheels*, 188 Kan. 124, 360 P.2d 1078 (1961); and K.S.A. 33-101 through 33-110.

Special problems also arise where third party beneficiaries would be affected by modification. Different rules apply where the beneficiary is a donee and where he is a creditor. See *Stanfield v. McBride*, 149 Kan. 567, 88 P.2d 1002 (1939); 17A Am. Jur. 2d, Contracts §§ 461-462; and Restatement (Second) of Contracts § 311.

The stipulation in a public construction contract that extra work or materials must be ordered in writing can be avoided by the parties to the contract where their words, acts, or conduct amount to a waiver or modification of the provision, or where the public entity by the acts or conduct of its proper officer or representative is estopped to rely on it. *Owens v. City of Bartlett*, 215 Kan. 840, 843, 528 P.2d 1235 (1974).

Whether any term of a written contract has been modified or waived by a subsequent agreement is a question of fact for the trial court. *Coonrod & Walz Constr. Co., Inc. v. Motel Enterprises, Inc., et al*, 217 Kan. 63, 535 P.2d 971 (1975).

124.23

RESCISSION, CANCELLATION AND RELEASE**A. Rescission and Cancellation**

A contract not fully performed on both sides may be rescinded or canceled by mutual agreement of the parties. An agreement to cancel a contract may be expressed orally or in writing, or it may be implied by the conduct of the parties. Whether there was a mutual agreement of the parties rescinding or canceling the contract is a question of fact for you to determine.

B. Release

A release is in itself a contract whereby one party, in return for something of value, known as “consideration,” gives up some right or claim *(he) (she)* has against another. Whether there was a release of any obligation in this case is a question of fact for you to determine.

As used in this instruction “something of value” may consist of a promise *(such as a promise to pay money or to perform services or to deliver goods)*, an act *(such as the payment of money, the delivery of goods, or the performance of services)*, or a forbearance *(such as forbearance to sue, to compete, to promise, or to act)*.

Notes on Use

The paragraphs above are separable, and only the appropriate one should be used. The first relates to rescission and cancellation, the second to release.

The first paragraph, dealing with rescission and cancellation, does not apply to certain contracts under K.S.A. 84-2-209, which provides in part:

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this article (section 84-2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification.

See also K.S.A. 16-105, relating to the release of a joint obligor. Notes on Use and Comments under PIK 4th 124.13, Promissory Estoppel, and 124.15, Joint Contracts, are applicable.

Comment**Rescission and Cancellation**

The Kansas rule (without reference to the Uniform Commercial Code) appears to be that the parties to an executory contract may, at any time prior to full performance on either side, agree to cancel and rescind. No problem of consideration is then involved. *Gibbs v. Erbert*, 198 Kan. 403, 412, 424 P.2d 276 (1967); 17A Am. Jur. 2d, Contracts § 554.

A contract for the compromise and settlement of a tort claim is subject to rescission for the same reason as any other contract. *Reynard v. Bradshaw*, 196 Kan. 97, 102, 409 P.2d 1011 (1966).

An attempt to rescind a contract must be made timely if it is to be effective. *Lehigh, Inc. v. Stevens*, 205 Kan. 103, 108, 468 P.2d 177 (1970).

Rescission is an equitable remedy designed to afford relief from contracts entered into through mistake, fraud, or duress. Ordinarily, the nature of relief in rescission is to place the parties in their original position. *Dreiling v. Home State Life Ins. Co.*, 213 Kan. 137, 147, 515 P.2d 757 (1973).

Rescission depends upon the intention of the parties as shown by their words, acts, or agreement. Parties to a contract may mutually rescind the transaction although neither party had a right to compel a rescission. *Owens v. City of Bartlett*, 215 Kan. 840, 844, 528 P.2d 1235 (1974).

In order to warrant rescission of a contract, the breach must be material and the failure to perform so substantial as to defeat the object of the parties in making the agreement. *Whiteley v. O'Dell*, 219 Kan. 314, 316, 548 P.2d 798 (1976); *Federal Land Bank of Wichita v. Krug*, 253 Kan. 307, 856 P.2d 111 (1993).

Parties by their agreement cannot contract away liabilities that are imposed by operation of law. *Woods v. Cessna Aircraft Co.*, 220 Kan. 479, 483, 553 P.2d 900 (1976).

Where one with knowledge of the facts entitling him to rescission of the contract afterwards ratifies it without duress, he is not entitled to have it canceled. Ordinarily an express ratification is not necessary in order to defeat the remedy of rescission. Acts or conduct inconsistent with an intention to avoid it, or in recognition of the contract, have the effect of an election to affirm it. *Nordstrom v. Miller*, 227 Kan. 59, 605 P.2d 545 (1980).

PIK 18.13(b) [PIK 4th 124.23] was cited in *Flett Construction Co., Inc. v. Williams*, 210 Kan. 28, 29, 500 P.2d 54 (1972).

Release

The release of an agent, who was the tortfeasor, extinguishes the right of action against his principal, even when the parties to the release attempt to reserve a right to proceed against the principal. *Jacobson v. Parrill*, 186 Kan. 467, 351 P.2d 194 (1960).

Defenses common to a claim of release may involve questions of agency, want of capacity and understanding, mutual mistake, fraud, duress and coercion, forged signature, want of delivery, want and failure of consideration, illegality, and the like. No attempt can be made in this instruction to cover such defenses, but PIK 4th 107.01 (agency), PIK 4th 127.40-127.42 (fraud), and instructions throughout this chapter may be helpful. The general rules governing contracts are applicable to releases, and instructions in individual cases must depend upon the issues and the evidence.

124.24

THIRD PARTY BENEFICIARIES

A party may enforce a contract expressly made for *(his)* *(her)* benefit even though *(he)* *(she)* was not a party to the transaction.

Notes on Use

The instruction should be used in cases where a party claims certain rights as a third party beneficiary under a contract. Authority for the instruction is found in *Martin v. Edwards*, 219 Kan. 466, 472, 473, 548 P.2d 779 (1976).

Comment

A valid and binding contract is essential to the right of a third party beneficiary to maintain an action on the contract. *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975) *aff'd in part and vacated in part* 219 Kan. 2, 547 P.2d 1015; *Cory v. Troth*, 170 Kan. 50, 223 P.2d 1008 (1950).

Before the issue is reached of whether a third party may enforce a contract from which he would benefit, the third party must show the existence of some provision in the contract that operates to his benefit. *Hartford Fire Ins. Co. v. Western Fire Ins. Co.*, 226 Kan. 197, 210, 597 P.2d 622 (1979).

Third party beneficiaries generally have been divided into three classes: (1) donee, (2) creditor, and (3) incidental. Only those beneficiaries falling into the first two classes may enforce a contract made for their benefit. See Williston on Contracts (3d ed.) p 356; 4 Corbin on Contracts §§ 774, 779C; 17A Am. Jur. 2d, Contracts §§ 150, 425-426, 435 *et seq.*; *Wilson-Cunningham v. Meyer*, 16 Kan. App. 2d 197, 820 P.2d 725 (1991).

The rule in Kansas is that the primary or paramount purpose of the contract need not be to benefit the third party before he may bring an action to enforce the contract. See *Martin v. Edwards*, 219 Kan. 466, 472, 473, 548 P.2d 779 (1976) and 4 Corbin on Contracts § 776. The contract may benefit the contracting parties as well. *Fasse v. Lower Heating and Air Conditioning, Inc.*, 241 Kan. 387, 736 P.2d 930 (1987); *Cornwall v. Jespersen*, 238 Kan. 110, 708 P.2d 515 (1985).

Where a contract for the sale of realty specifically required the vendor to pay the real estate agent's commission, the contract was made, at least in part, for the benefit of the agent, and the agent could maintain an action against the vendor for the commission. *Holmes v. Kalbach*, 173 Kan. 736, 252 P.2d 603 (1953).

A promise by the beneficiary to collect and pay the whole or part of the proceeds of a policy and certificate of insurance to a third person is valid and enforceable against the promisor. *French v. French*, 161 Kan. 327, 167 P.2d 305, *cert. denied* 329 U.S. 727, 67 S. Ct. 81, 91 L. Ed. 629 (1946).

A clause in a construction contract providing for a percentage retention of periodic payments while the contract is being performed does not create rights in a materialman as a third party beneficiary. *Holiday Development Co. v. Tobin Construction Co.*, 219 Kan. 701, 549 P.2d 1376 (1976).

The intent to benefit a third party should be clearly expressed in the contract. *Ronnau v. Caravan International Corporation*, 205 Kan. 154, 159, 468 P.2d 118 (1970). However, in determining whether a contract was made for the benefit of a third party, a court may properly consider the provisions of the contract and the circumstances and surroundings of the parties. *Gust v. Provident Life & Accident Ins. Co.*, 136 Kan. 88, 91, 12 P.2d 831 (1932). Knowledge that a contract will benefit a third party does not equate to

an intent to benefit the third party. *Noller v. General Motors Corp.*, 244 Kan. 612, 772 P.2d 271 (1989). The name of the person to be benefited by a contract need not be given if he is otherwise sufficiently described or designated; a person so described may recover on a contract made for his benefit. *Weld v. Carey*, 122 Kan. 666, 253 P. 235 (1927).

When a person makes a promise to another for the benefit of a third person, the third person may maintain an action to enforce the contract even though he had no knowledge of the contract and paid none of the consideration. *Martin v. Edwards*, 219 Kan. 466, 548 P.2d 779 (1976); *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975); *Keith v. Schiefen-Stockham Insurance Agency, Inc.*, 209 Kan. 537, 498 P.2d 265 (1972); *Burton v. Larkin*, 36 Kan. 246, 13 P. 398 (1887).

In *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 3, 20, 91 P.3d 531 (2004), the Supreme Court cited 124.24 as evidence that Kansas law allows a qualified third party to enforce a contract expressly made for his or her benefit even though they were not a party to the transaction.

124.25

ASSIGNMENT OF CONTRACTUAL RIGHTS

An assignment of a contractual right is a transfer by the owner of that right to another party. An assignment may be written, oral, or implied by the behavior of the parties.

An “assignor” is a person who assigns or transfers a right and an “assignee” is a person to whom a right is transferred or assigned.

An assignment passes all the assignor’s title or interest to the assignee, and divests the assignor of all right of control over the subject matter of the assignment.

Notes on Use

The instruction should be given when there are issues of fact regarding the rights of an assignor and an assignee, or an assignee and an obligor. Authority for paragraph three is found in *Patrons State Bank & Trust Co. v. Shapiro*, 215 Kan. 856, 861, 528 P.2d 1198 (1974), and *Army Nat’l Bank v. Equity Developers, Inc.*, 245 Kan. 3, 774 P.2d 919 (1989).

Comment

For a complete discussion of the distinction between assignment of rights and delegation of duties, see 4 Corbin on Contracts §§ 856 *et seq.*; Williston on Contracts (3d ed.) pp 404, 412, 417-423.

An assignment is an expression of intention by the assignor that his right shall pass to the assignee. *Brewer v. Harris*, 147 Kan. 197, 201, 75 P.2d 287 (1938). An assignment passes all of the assignor’s title or interest to the assignee, and divests the assignor of all right of control over the subject matter of the assignment. *Patrons State Bank & Trust Co. v. Shapiro*, 215 Kan. 856, 861, 528 P.2d 1198 (1974). The assignee stands in the shoes of the assignor, meaning that the relevant obligations, defenses, claims, etc. that burden the assignor will equally burden the assignee. *OXY USA, Inc. v. Colorado Interstate Gas Co.*, 20 Kan. App. 2d 69, 883 P.2d 1216 (1994).

The right to receive monies due, and to become due, for materials and labor is subject to a valid assignment. *Hall v. Terra Cotta Co.*, 97 Kan. 103, 154 P. 210 (1916). For assignability of a covenant not to compete, see *Safelite Glass Corp. v. Fuller*, 15 Kan. App. 2d 351, 807 P.2d 677 (1991).

The established rule forbids assignment of a cause of action based in tort. *Redmon v. Salisbury Co.*, 178 Kan. 639, 641, 290 P.2d 809 (1955); *Old Colony Ins. Co. v. Kansas Public Ser. Co.*, 154 Kan. 643, 121 P.2d 193 (1942); *Heinson v. Porter*, 244 Kan. 667, 772 P.2d 778 (1989) *overruled in part on other grounds* *Glenn v. Fleming*, 247 Kan. 296, 799 P.2d 79 (1990). However, in Kansas, all other causes in action, including actions for breach of contract are assignable. *Alldritt v. Kansas Centennial Global Exposition, Inc.*, 189 Kan. 649, 657, 371 P.2d 181 (1962); *Commodore v. Armour & Co.*, 201 Kan. 412, 441 P.2d 815 (1968).

Rights arising out of contracts involving personal services, special confidence, and the like, are not assignable without the consent of the obligor. *Campbell v. Sumner County*, 64 Kan. 376, 67 P. 866 (1902); *Smith & English, Partners, v. Board of Education*, 115 Kan. 155, 222 P. 101 (1924); *Standard Chautauqua System v. Gift*, 120 Kan. 101, 242 P. 145 (1926).

A party to a contract may not avoid liability on the contract by an assignment unless the other party releases the assignor from further liability. *Dondlinger & Sons' Constr. Co. v. EMCCO, Inc.*, 227 Kan. 301, 606 P.2d 1026 (1980).

When an assignee seeks a written acceptance from the debtor and a written acceptance is made subject to a condition, the debtor will not be bound unless the condition is performed. *Brown v. East Side National Bank*, 196 Kan. 372, 375, 411 P.2d 605 (1966).

Consent to an assignment is not necessary to bind a debtor with notice. *Apperson v. Security State Bank*, 215 Kan. 724, 734, 528 P.2d 1211 (1974). However, the notice requirement is only to protect the debtor from being prejudiced by making payments in good faith to the original creditor. *Whisler v. Whisler*, 9 Kan. App. 2d 624, 684 P.2d 1025 (1984).

One who takes an assignment of a void contract acquires nothing. *Kumberg v. Kumberg*, 232 Kan. 692, 659 P.2d 823 (1983).

124.26

WAIVER

A party is discharged from *(his) (her)* obligation to perform a contract, when the other party to the contract voluntarily and intentionally renounces the right of performance, or exhibits action or inaction that is inconsistent with that right.

Notes on Use

The instruction should be given when there is an issue of fact concerning the waiver of performance under a contract. Authority for the instruction is found in *Proctor Trust Co. v. Neihart*, 130 Kan. 698, 288 P. 574 (1930); *United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 526, 561 P.2d 792 (1977); and *Southwest Nat'l Bank v. Simpson and Son, Inc.*, 14 Kan. App. 2d 763, 799 P.2d 140 (1990).

Comment

Waiver is consensual in nature, but the intention may be inferred from conduct and the knowledge of the waiver may be actual or constructive. *City of Wamego v. L.R. Foy Constr. Co.*, 9 Kan. App. 2d 168, 675 P.2d 912, *rev. denied* 234 Kan. 1076 (1984). However, no inference of intent to waive can be drawn from conduct of a party when there is unambiguous language in the contract stating a contrary intention. *Postal Savings & Loan Ass'n v. Freel*, 10 Kan. App. 2d 286, 698 P.2d 382 (1984).

The manifestation of the intent to waive must be unequivocal and requires some distinct act or inaction which is inconsistent with the intention to claim the right to performance. *Patrons Mut. Ins. Ass'n v. Union Gas System, Inc.*, 250 Kan. 722, 830 P.2d 35 (1992).

B. INSURANCE CONTRACTS

124.31

POLICY TERMS

The obligation of the insurance company is governed by the provisions of the policy. (*Endorsements*) (*Applications attached*) are a part of the policy.

Words used in an insurance policy are to be read and understood in their ordinary and usual meaning (*except those specially defined by the court in these instructions*).

Notes on Use

K.S.A. 40-420(2) and K.S.A. 40-2205(A) relate to the attachment of applications to life insurance and accident and sickness insurance policies. See Notes on Use and Comment under PIK 4th 124.34, which deals with applications for insurance. For other definitions see PIK 4th 124.41 and 124.45. Authority for the instruction comes from *Koehn v. Central National Ins. Co.*, 187 Kan. 192, 199, 354 P.2d 352 (1960), which further holds that where words have acquired a peculiar and appropriate meaning in law, they are to be construed according to that meaning. The language of a policy, being that selected by the insurer and for its benefit, must be clear and unambiguous, and any reasonable doubt as to its meaning must be resolved in favor of the insured.

Comment

Insurance may be defined as any contract whereby one party promises for consideration to indemnify the other against certain risks. *State, ex rel., v. Anderson*, 195 Kan. 649, 408 P.2d 864 (1965).

Courts will construe a contract of insurance as to uphold its validity if reasonably possible. *Herrman v. Folkerts*, 202 Kan. 116, 120, 446 P.2d 834 (1968).

It is a generally accepted rule that insurance policies are to be construed in favor of the insured and against the company. This rule, however, is to be invoked where there exist rational grounds for construction of the policy. That is, the contract must contain provisions or language of doubtful, ambiguous or conflicting meaning, as gathered from a natural interpretation of its language. *Casey v. Aetna Casualty & Surety Co.*, 205 Kan. 495, 498, 470 P.2d 821 (1970); *Buchanan v. Employers Mutual Liability Ins. Co.*, 201 Kan. 666, 670, 443 P.2d 681 (1968); *Ferguson v. Phoenix Assurance Co.*, 189 Kan. 459, 463, 370 P.2d 379 (1962); *Koehn v. Central National Ins. Co.*, 187 Kan. 192, 199, 354 P.2d 352 (1960).

Insurance is a matter of contract and parties have the right to employ whatever terms they wish, and the courts will not rewrite them, so long as those terms do not conflict with pertinent statutes or public policy. *Gibson v. Metropolitan Life Ins. Co.*, 213 Kan. 764, 770, 518 P.2d 422 (1974); *Levier v. Koppenheffer*, 19 Kan. App. 2d 971, 879 P.2d 40 (1994).

A court, in construing an insurance policy, should consider the instrument as a whole and endeavor to ascertain the intent of the parties from the language used, taking into account the situation of the parties, the nature of the subject matter and the purpose to be accomplished. *Mah v. United States Fire Ins. Co.*, 218 Kan. 583, 586, 545 P.2d 366 (1976).

The construction and effect of a written contract of insurance is a matter of law to be determined by the court. If the facts are admitted, then it is for the court to decide whether they come within the terms of the policy. *Mah v. United States Fire Ins. Co.*, 218 Kan. 583, 545 P.2d 366 (1976); *Clark v. Prudential Ins. Co.*, 204 Kan. 487, 490, 464 P.2d 253 (1970); *Goforth v. Franklin Life Ins. Co.*, 202 Kan. 413, 416, 449 P.2d 477 (1969).

Liability which is not clearly excluded from coverage under a general comprehensive liability insurance contract is presumed to have been included. *Arnold v. Western Casualty & Surety Co.*, 209 Kan. 80, 84 495 P.2d 1007 (1972). Exceptions, limitations, and exclusions to insurance contracts are narrowly construed. *Newton v. Nicholas*, 20 Kan. App. 2d 335, 887 P.2d 1158 (1995); *Utility Maintenance Contractors, Inc. v. West American Ins. Co.*, 19 Kan. App. 2d 229, 866 P.2d 1093 (1994).

124.32

CONSTRUCTION OF POLICY—AMBIGUITY

When the terms of the insurance policy (*including any endorsements attached thereto*) are susceptible of more than one meaning, the policy provisions must be given the meaning which is most favorable to the policyholder.

Notes on Use

Where the ambiguity in the policy presents a clear question of law, the court should construe the contract and instruct the jury as to the rights of the parties. If the ambiguity presents an issue of fact, the suggested instruction may be used to guide the jury in resolving that issue.

Comment

If an ambiguity is presented as an issue of fact in an insurance contract, an instruction similar to this one should be given. See *Snodgrass v. State Farm Mut. Auto. Ins. Co.*, 15 Kan. App. 2d 153, 157, 804 P.2d 1012, rev. denied 248 Kan. 997 (1991).

An insurance company prepares its own policies and is responsible for any proper consequences of not making the policy clear and understandable. Where an ambiguity exists in the policy, the rule of construction in favor of the policyholder applies. *Leiker v. State Farm Mutual Automobile Ins. Co.*, 193 Kan. 630, 396 P.2d 264 (1964); *Alliance Life Ins. Co. v. Ulysses Volunteer Fireman's Relief Assn.*, 215 Kan. 937, 529 P.2d 171 (1974); *Fancher v. Carson-Campbell, Inc.*, 216 Kan. 141, 530 P.2d 1225 (1975); and *Mah v. United States Fire Ins. Co.*, 218 Kan. 583, 545 P.2d 366 (1976). Also see 43 Am. Jur. 2d, Insurance §§ 279 *et seq.*

The rule of liberal or extended interpretation is not applicable in disputes between two insurance companies. *United States Fid. & Guar. Co. v. Western Cas. & Surety Co.*, 195 Kan. 603, 408 P.2d 596 (1965); *Maryland Cas. Co. v. Alliance Mut. Cas. Co.*, 223 Kan. 674, 576 P.2d 625 (1978).

The test to be applied in determining the intention of the parties to an insurance contract is not what the insurer intended the policy to mean, but what a reasonable person in the position of the insured would understand it to mean. *Colfax v. Johnson*, 270 Kan. 7, 11, 11 P.3d 1171 (2000). The intention of the parties is evidenced by the language in the contract. *Crescent Oil Co. v. Federated Mut. Ins. Co.*, 20 Kan. App. 2d 428, 888 P.2d 869 (1995). In interpreting an insurance policy, the court should consider the policy as a whole and determine the intent of the parties from the language of the instrument while taking into account the situation of the parties, nature of the subject matter, and purpose to be accomplished. *Levier v. Koppenheffer*, 19 Kan. App. 2d 971, 879 P.2d 40 (1994); *Mah v. United States Fire Ins. Co.*, 218 Kan. 583, 545 P.2d 366 (1976).

If the insurer intends to limit or restrict coverage in the policy, it must use clear and unambiguous language; otherwise, the policy will be liberally construed in favor of the insured. *Atlantic Avenue Associates v. Central Solutions, Inc.*, 29 Kan. App. 2d 169, 172, 24 P.3d 188 (2001).

To be ambiguous, the contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural interpretation of its language. Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it uncertain which one of two or more meanings is the proper meaning. *Jones v. Reliable Security, Inc.*, 29 Kan. App. 2d 617, 626-27, 28 P.3d 1051 (2001).

When an insurance contract is not ambiguous, the court may not make another contract for the parties. Its function is to enforce the contract as made, according to its terms. *Jones v. Reliable Security, Inc.*, 29 Kan. App. 2d 617, 627, 28 P.3d 1051 (2001).

124.33

**CONSTRUCTION OF POLICY—CONFLICT BETWEEN PRINTED
AND WRITTEN PROVISIONS OR ENDORSEMENTS**

When there is a conflict between the printed portions of the policy and the (endorsements) (written or typewritten portions), the (endorsements) (written or typewritten portions) are controlling.

Notes on Use

See Notes on Use under PIK 4th 124.32, Construction of Policy—Ambiguity.

Comment

“The terms of an insurance contract, as any other contract, must be considered together with a view of bringing them into workable harmony whenever reasonably possible to do so.” *Saul v. St. Paul-Mercury Indemnity Co.*, 173 Kan. 679, 250 P.2d 819 (1952).

Endorsements on a policy prevail over printed provisions of the policy. *Lindesmith v. Republic Mutual Fire Ins. Co.*, 189 Kan. 201, 368 P.2d 35 (1962).

“When the terms of a typewritten answer in an application [attached to] an insurance contract and the terms of a typewritten rider attached to such contract irreconcilably conflict with a printed provision in the policy, the typewritten parts prevail over the printed and the conflicting printed provision should be considered as deleted or omitted from the contract.” *Harrison v. Farmers & Bankers Life Ins. Co.*, 163 Kan. 277, 181 P.2d 520 (1947). Likewise, if there is an irreconcilable conflict between the printed policy and handwritten portions, preference should be given to the handwritten portions when construing the policy. *Lightner v. Centennial Life Ins. Co.*, 242 Kan. 29, 744 P.2d 840 (1987).

Where a restrictive endorsement attached to an insurance policy and the issuance of the insurance policy are a part of the same transaction, and the restriction was agreed to in order to induce the issuance of the policy, there was adequate consideration for the acceptance of the restrictive endorsement. *Avery v. Nelson*, 205 Kan. 311, 469 P.2d 349 (1970).

In construing an insurance policy a court should consider the instrument as a whole and endeavor to ascertain the intention of the parties from the language used, taking into account the situation of the parties, the nature of the subject matter, and the purpose to be accomplished. *Mah v. United States Fire Ins. Co.*, 218 Kan. 583, 586, 545 P.2d 366 (1976); *Bramlett v. State Farm Mutual Ins. Co.*, 205 Kan. 128, 130, 468 P.2d 157 (1970).

124.34

APPLICATION FOR INSURANCE**A. Delay in Acting on Application**

After an applicant makes an application and pays the initial premium, the company has a reasonable time to act on the application. It may accept the application and premium and issue a policy, or it may reject the application, return the premium, and notify the applicant that it declines to issue a policy. If it does not return the premium and notify the applicant within a reasonable time, then it becomes bound to the same extent as though it had accepted the application and premium and had written the insurance requested. Whether the defendant acted within a reasonable time is for you to determine.

B. Conflicts between Application and Policy

The application and the policy are to be considered as parts of a single contract of insurance.

When there is a conflict between typewritten portions of the application, which forms a part of the policy, and certain printed portions of the policy, the application portions are controlling.

Notes on Use

The paragraphs are separable; only those appropriate to the case should be given.

Comments under PIK 4th 124.33 apply to paragraph B. Paragraph B is applicable only when the application is attached to and made a part of the policy.

Comment

An insurance company must act one way or the other upon an application within a reasonable time; and what constitutes a reasonable time is a question for the trier of fact. *Redman v. Mutual Benefit Health & Accident Ass'n*, 183 Kan. 449, 327 P.2d 854 (1958); *Harvey v. United Ins. Co.*, 173 Kan. 227, 245 P.2d 1185 (1952).

Whether or not the delay of an agent in transmitting an application to the company is unreasonable is a question for the trier of fact. *Boyer v. Hail Insurance Co.*, 86 Kan. 442, 121 P. 329 (1912).

Where the truth of statements in an application for insurance, or the facts as to the making of the application, are in dispute, a jury trial may be demanded. *Schneider v. Washington National Ins. Co.*, 200 Kan. 380, 393, 437 P.2d 798 (1968).

An insurer waives reliance on the statements contained in an application for insurance when the insurer's agent fills in the application without propounding any of the questions to the insured, or to any authorized agent or representative of the insured. *Id.*, 200 Kan. at 395.

An insured is generally bound by an application signed by his authorized agent. *Id.*, 200 Kan. at 383.

It is the duty of an insurance company that accepts an application for insurance on a form furnished by the company to issue a policy of insurance in accordance with the application. *Stamps v. Consolidated Underwriters*, 205 Kan. 187, 200, 468 P.2d 84 (1970).

124.35

NOTICE OF CANCELLATION

A notice of cancellation must be received by a policyholder in order to be effective. Whether or not a policyholder receives a notice of cancellation is for the jury to determine.

If a policyholder receives a notice of cancellation, then the policy is canceled in accordance with such notice; but if a policyholder does not receive a notice of cancellation, then the notice is ineffective and the policy is not canceled.

Notes on Use

Use in conjunction with PIK 4th 102.74, Presumption that Mail Was Received.

Comment

In order to effectively terminate a motor vehicle liability insurance policy, the insurer need only mail such notice by certified or registered mail, or by U.S. Post Office certificate of mailing, to the insured at the last address provided by the insured. See K.S.A. 40-3118(b); *Feldt v. Union Ins. Co.*, 240 Kan. 108, 726 P.2d 1341 (1986); *Bell v. Patrons Mut. Ins. Co.*, 15 Kan. App. 2d 791, 816 P.2d 407 (1991).

When a group policy of disability insurance provides that part of the premiums are to be paid by an insured employee, neither the employer nor the insurance company may cancel or modify the policy without reasonable notice to the contributing employee. *Ogden v. Continental Casualty Co.*, 208 Kan. 806, 810, 494 P.2d 1169 (1972).

An insurer, who provides an insurance policy for a definite term without any reference to a right of renewal, is not required to give notice of expiration. *Shepard v. United States Fidelity & Guaranty Co.*, 210 Kan. 652, 653, 504 P.2d 228 (1972). When the conditional receipt for insurance states unequivocally and clearly that there is no insurance unless the policy is delivered within a specified time, the contract expires by its own terms, without notice, unless the policy is delivered. *Thomas v. Thomas*, 250 Kan. 235, 824 P.2d 971 (1992).

One who seeks to rescind a contract on grounds of fraud must do so with reasonable promptness after discovery of the fraud. *Moore v. Farm & Ranch Life Ins. Co.*, 211 Kan. 10, 11, 505 P.2d 666 (1973).

A policy that is withdrawn or recalled before it becomes effective does not require notice of cancellation. *Marker v. Preferred Fire Ins. Co.*, 211 Kan. 427, 437, 506 P.2d 1163 (1973).

124.36

SUBROGATION

A. Legal Subrogation

By operation of law, _____ (*name of subrogee*) has become subrogated to any right which _____ (*name of subrogor*) may have against _____ (*name of third person*) arising out of _____ (*describe transaction*). _____ (*Name of subrogee*) stands in the shoes of _____ (*name of subrogor*) and may enforce any right which _____ (*name of subrogor*) has against _____ (*name of third person*), subject to any (*defenses, credits, counterclaims*) which _____ (*name of third person*) may have against _____ (*name of subrogor*). The (*acts*) (*omissions*) (*contract rights*) of _____ (*name of subrogor*) are to be considered by you as the (*acts*) (*omissions*) (*contract rights*) of _____ (*name of subrogee*) for the purpose of determining the issues submitted to you in this action.

“Subrogated” means that the rights of _____ (*name of subrogor*) were transferred to _____ (*name of insurance company*), and it now stands in (*his*) (*her*) place.

B. Conventional Subrogation—Collision Loss

_____ (*Name of insurance company*) was obligated under a policy of insurance to pay for (*repairs to*) the (_____) vehicle, and it has done so. Upon paying the loss, it became subrogated to the rights of (_____) against (_____).

“Subrogated” means that the rights of _____ (*name of subrogor*) were transferred to _____ (*name of insurance company*), and it now stands in (*his*) (*her*) place.

The acts or failure to act of the driver of the (_____) vehicle are to be considered by you as the acts or failure to act of _____ (*name of insurance company*). (*The insurance company can recover in this case only if the driver of the [_____] vehicle could recover.*)

Notes on Use

Instruction A is designed for use where the subrogation arises by operation of law. Instruction B is designed for use where an automobile insurance carrier has paid a collision loss, has acquired the rights of subrogation by contract under the policy, and brings the action in its own name.

Where the subrogee insurance company properly brings the action in the name of the subrogor, this instruction should not be used. The case should be tried and the jury instructed as though the insured were the sole party in interest without mention of the interest of the insurer. See *Ellsaesser v. Mid-Continent Casualty Co.*, 195 Kan. 117, 119, 403 P.2d 185 (1965).

It is the duty of the court to determine whether under the facts a party is entitled to be subrogated; once the court makes that determination, then the court must instruct the jury as to how the doctrine applies.

The implications of K.S.A. 60-213(d) should be examined carefully with reference to any counterclaim that may exist against a subrogor in favor of a third person.

Comment

“ ‘Subrogation’ ... is a substitution of persons by which another person succeeds to the rights of a creditor, or similar claimant, in relation to the debt or claim ... [Subrogation] is of two kinds, ‘legal’ and ‘conventional.’ The former is grounded in equity and arises by operation of law, which gives to a third person who has been compelled to pay a remedy as against one who, in justice, ought to pay. Some writers have treated it as in the nature of an equitable assignment. Ordinarily when the term is used without qualification ‘legal’ subrogation is meant. ‘Conventional’ subrogation is founded upon contract, express or implied.” *New York Ins. Co. v. Tice*, 159 Kan. 176, 181, 152 P.2d 836 (1944), *overruled on other grounds Ellis Canning Co. v. International Harvester Co.*, 174 Kan. 357, 255 P.2d 658 (1953). In the *Tice* case, the court summarizes the situations giving rise to conventional subrogation, and notes which party should bring the action.

A subrogee may assert any right of the subrogor against the party primarily responsible, including a right sounding in contract. *Employers Mutual Casualty Co. v. Shepherd-Vineyard Motors*, 189 Kan. 525, 370 P.2d 388 (1962).

When an employer is compelled to pay damages as the result of negligent acts of his employee, under the doctrine of subrogation he immediately becomes entitled to full indemnity against the employee, or against his estate, and his insurer. *Jacobson v. Parrill*, 186 Kan. 467, 475, 351 P.2d 194 (1960); *Graham v. Barber*, 192 Kan. 554, 558, 390 P.2d 23 (1964).

The rights of the insurer against the wrongdoer cannot rise higher than the rights of the insured against the latter, because the insurer as subrogee, in contemplation of law, stands in the place of the insured and succeeds to whatever rights he may have in the matter. Any defense which a wrongdoer has against the insured is good against the insurer subrogated to the rights of the insured. 44 Am. Jur. 2d, Insurance §§ 1794-1795; *Patrons Mut. Ins. Ass’n. v. Union Gas Systems*, 250 Kan. 722, 830 P.2d 35 (1992).

Where a loss is covered partially by insurance, the insured is the real party in interest to bring suit for the entire loss. The insured holds in trust for the insurer the part of the recovery paid by the insurer. *Cullen v. Atchison, T. & S. F. Rly Co.*, 211 Kan. 368, 374, 507 P.2d 353 (1973); *J.C. Livestock Sales, Inc. v. Schoof*, 208 Kan. 289, 491 P.2d 560 (1971); *Fidelity & Deposit Co. of Maryland v. Shawnee State Bank*, 13 Kan. App. 2d 182, 766 P.2d 191 (1989).

The right of subrogation of an insurer arises by operation of law without regard to whether there is a provision in the insurance policy or any writing declaring the right. It is a creature of equity and does not spring from contract. *New Hampshire Ins. Co. v. Kansas Power & Light Co.*, 212 Kan. 456, 457, 510 P.2d 1194 (1973). See also *Oetinger v. Polson*, 20 Kan. App. 2d 255, 885 P.2d 1274 (1995).

When an insurer has fully satisfied a claim of its insured and thereby becomes subrogated to the rights of the insured, it alone becomes the real party in interest. *Appalachian Ins. Co. of Providence v. Betts*, 213 Kan. 609, 610, 518 P.2d 385 (1974).

A subrogation agreement is ineffective to confer a right of contribution between joint tortfeasors where it would operate to thwart the law of Kansas, which prohibits such contribution. *American States Ins. Co. v. Hartford Accident & Indemnity Co.*, 218 Kan. 563, 545 P.2d 399 (1976).

Mere anticipation of a claim does not permit an insurer to become subrogated to its insured’s rights. The insurer must make a payment to the insured or suffer a judgment requiring payment to its insured before subrogation takes effect. *Burke v. Schroth*, 4 Kan. App. 2d 13, 601 P.2d 1172 (1979).

124.37

PROOF OF LOSS—WAIVER

When an insurance policy requires the insured to provide a written Proof of Loss to the insurer within _____ (*insert number*) days after the loss, if the insured fails to furnish such proof, the insured cannot recover unless the insurer waived the furnishing of a Proof of Loss.

The insurer waived the furnishing of a Proof of Loss if: _____ (*insert one or more of the following*)

- **(it denied liability on grounds other than failure to furnish Proof of Loss.)**
- **(it attempted to make settlement with the insured.)**
- **(it offered to pay all or part of the loss.)**
- **(its general agent orally granted an extension of time to furnish Proof of Loss.)**
- **(it retained an incomplete Proof of Loss for an unreasonable period of time without objection.)**
- **(it failed to furnish Proof of Loss forms to the insured within ten days after receiving notice of the loss.)**

Notes on Use

K.S.A. 40-924 requires the furnishing of Proof of Loss forms by insurance companies in fire or tornado cases within 10 days after receiving notice, and provides that upon failure to furnish such forms, the failure of the insured to make Proof of Loss shall be no defense.

K.S.A. 40-2203(A)(7) provides a uniform policy provision for Proof of Loss in policies of accident and sickness insurance.

Comment

The insured has a duty to give notice to his company of his loss and of the fact that he is making a claim under his policy, before the company is obligated to take action. *Sloan v. Employers Casualty Ins. Co.*, 214 Kan. 443, 445, 521 P.2d 249 (1974).

Where the policy requires it, Proof of Loss must be given or facts constituting a waiver must be shown. A party asserting waiver of the furnishing of Proof of Loss has the burden of proof on that issue. *Lyon v. Kansas City Fire & Marine Ins. Co.*, 176 Kan. 411, 271 P.2d 291 (1954).

Insured has provided reasonable proof of loss when the insurer is provided with a bill which shows a clear relation to a covered loss. A clear relation exists when reasonable minds would conclude that there is a substantial likelihood that the loss evinced by the bill bears a logical connection to a covered loss. *Hephner v. Traders Ins. Co.*, 254 Kan. 226, 864 P.2d 674 (1993); *Dibassie v. American Standard Ins. Co.*, 8 Kan. App. 2d 515, 661 P.2d 812, (1983).

In the absence of fraud or the elements of estoppel, proofs of loss, injury, or death, furnished by an insured or beneficiary, are not conclusive upon the insured or beneficiary as to the cause of the loss, injury,

or death or as to the amount of the loss, but may be shown by other evidence to be erroneous or incomplete or to be the result of mistake, misfortune, or inadvertence. *Willey v. Sheppard*, 61 Kan. 351, 59 P. 651 (1900); *Gass v. Casualty Co.*, 113 Kan. 610, 214 P. 1115 (1923); *Smith v. Prudential Ins. Co.*, 136 Kan. 120, 12 P.2d 793 (1932).

“In order to establish the waiver of a legal right there must be a clear, unequivocal and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part.” *Lyon v. Kansas City Fire & Marine Ins. Co.*, 176 Kan. 411, 414, 271 P.2d 291 (1954).

As used in insurance law, a waiver is often defined as an intentional, voluntary relinquishment of a known right. Estoppel is defined as the misleading of a party entitled to rely on the acts or statements in question, as a consequence of which he changes his position to his detriment.

“It is the general rule that where an insurer, with knowledge of facts warranting forfeiture, enters into negotiations after loss which recognize continued validity of the policy and induce the insured to incur trouble or expense under the belief the loss will be paid, the forfeiture is waived.” *Marett v. World Fire & Ins. Co.*, 160 Kan. 125, 160 P.2d 664 (1945).

When the insured supplies documentation regarding the amount of loss and the insurer pays the amount documented, the insured cannot recover on an action claiming underpayment as a result of error. *Miner v. Farm Bur. Mut. Ins. Co., Inc.*, 17 Kan. App. 2d 598, 841 P.2d 1093 (1993).

C. SICKNESS AND ACCIDENT INSURANCE CONTRACTS

124.41

DEFINITIONS

“Accident” means an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often, but not necessarily, accompanied by a manifestation of force.

“Active” means in a state of action, progress, change or motion.

“Bodily injury” means injury sustained to the person through external and accidental means, as opposed to disease.

“Dormant” means in a state of rest, inactivity, inoperativeness or quiescence.

A person is incapable of “engaging in any gainful occupation” if *(he)* *(she)* is unable to work with reasonable continuity in *(his)* *(her)* usual occupation or in such occupation as *(he)* *(she)* is physically and mentally qualified for, and to perform the essential duties incident thereto. “Engaging in a gainful occupation” imports a continuing earning capacity upon which one can rely to a substantial degree for a livelihood. It is not the doing of odd jobs of a comparatively trifling nature.

“Illness” refers to sickness, infection, disease, or a disorder of health, as differentiated from bodily injury caused by external force.

“A totally disabled person” is a person who because of mental or physical incapacity is for all practical purposes unable to engage in any type of gainful employment for which *(he)* *(she)* normally would have been qualified.

“Other insurance” means insurance in addition to that covered by the policy under consideration.

Notes on Use

Definitions contained within the policy will control. Those given above are intended for use only when the terms are not defined in the policy. The definitions are separable, and only those applicable should be given.

Comment

Supporting authorities for definitions are as follows:

“Accident”—*Spence v. New York Life Ins. Co.*, 154 Kan. 379, 386, 118 P.2d 514 (1941); *Bohanan v. Schlozman Ford, Inc.*, 188 Kan. 795, 798, 366 P.2d 28 (1961); *Williams v. Benefit Trust Life Ins. Co.*, 200 Kan. 51, 59, 434 P.2d 765 (1967); *Boring v. Haynes*, 209 Kan. 413, 496 P.2d 1385 (1972).

“Active” and “Dormant”—*Williams v. Benefit Trust Life Ins. Co.*, 200 Kan. 51, 58, 434 P.2d 765 (1967).

“Bodily injury”—43 Am. Jur. 2d, Insurance § 563.

“Engaging in any gainful occupation” or “Engaging in any and every kind of work”—*Edwards v. National Council, Etc.*, 220 N.C. 41, 16 S.E.2d 466, 470 (1941); *Kaneb v. Equitable Life Assur. Soc.*, 304 Mass. 309, 23 N.E.2d 889, 891 (1939); *Moots v. Bankers Life Co.*, 10 Kan. App. 2d 640, 707 P.2d 1083 (1985).

“Ill” and “Illness”—43 Am. Jur. 2d, Insurance § 563; Dorland, American Illustrated Medical Dictionary 725 (24th ed, 1965).

“Totally disabled”—*Wolf v. Mutual Benefit Health & Accident Association*, 188 Kan. 694, 366 P.2d 219 (1961); *Schneider v. Washington National Ins. Co.*, 200 Kan. 380, 402, 437 P.2d 798 (1968); *Brown v. Continental Casualty Co.*, 209 Kan. 632, 498 P.2d 26 (1972); *Matthews v. Travelers Insurance Co.*, 212 Kan. 292, 510 P.2d 1315 (1973). See also *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247 (1987).

“Other Insurance”—*Sturdy v. Allied Mutual Ins. Co.*, 203 Kan. 783, 457 P.2d 34 (1969), *superseded on other grounds by statute* as stated in *Farmers Ins. Co. v. Gilbert*, 14 Kan. App. 2d 395, 791 P.2d 742 (1990).

124.42

EFFECT OF PRIOR NONDISABLING CONDITION

When a person has a disease or physical ailment which is dormant and nondisabling, and sustains an accidental injury which aggravates, activates, or revives the disease or physical ailment, causing disability, then the accident is the cause of the resulting disability.

Comment

As authority for the instruction, see *Williams v. Benefit Trust Life Ins. Co.*, 195 Kan. 579, 408 P.2d 631 (1965); *Williams v. Benefit Trust Life Ins. Co.*, 200 Kan. 51, 55, 434 P.2d 765 (1967).

It is the general rule that the origin or inception of a sickness or disease, within the meaning of a health or accident policy requiring that sickness and disease be contracted after the effective date of the policy, is that point in time when the disease becomes manifest or active or when there is a distinct symptom or condition from which one learned in medicine can diagnose the disease. *Southards v. Central Plains Ins. Co.*, 201 Kan. 499, 501, 441 P.2d 808 (1968).

Knowledge of the condition by one afflicted with disease is not essential to establish the existence or date of origin of the disease. *Id.*, 201 Kan. at 502.

A dormant disease is one which is quiescent, passive, resting, or static. *Boring v. Haynes*, 209 Kan. 413, 421, 496 P.2d 1385 (1972). Where an accidental injury activates or aggravates a dormant disease or infirmity, the accident may be said to be the cause of the resulting disability or death. *Id.*, 209 Kan. at 421. See also *Jolly v. Kansas Public Employees Retirement System*, 214 Kan. 200, 519 P.2d 1391 (1974).

D. FIRE, HAIL AND WINDSTORM INSURANCE CONTRACTS**124.45****DEFINITIONS**

“Fire” is the evolution of visible light and heat in the burning of ignited material, with either slow or rapid combustion.

“Windstorm” is a climatic condition in which there is wind of extraordinary or unusual violence, either with or without rain.

Notes on Use

The definitions in this instruction are intended for use only when the terms are not defined in the policy. The definitions are separable and only those applicable should be used.

Comment

Definitions contained within the policy control.

The word “fire” as used in a policy, in the absence of language showing a contrary intention, is to be given its ordinary meaning, which includes the idea of visible heat or light. Wool, destroyed by spontaneous combustion without visible flame or glow, was not destroyed by fire according to *Western Woolen Mill Co. v. Northern Assur. Co.*, 139 F. 637 (8th Cir. 1905), *cert. denied* 199 U.S. 608, 26 S. Ct. 750, 50 L. Ed. 331 (1905). Fire may be a burning by slow or a burning by rapid combustion, and if the policy makes no distinction between them, a loss by either is covered by its general terms. Spontaneous combustion, if not expressly excluded, is included. 43 Am. Jur. 2d, Insurance § 478.

Fire insurance policies cover losses from “hostile” fires, not losses from “friendly” fires. *Youse v. Employers Fire Ins. Co.*, 172 Kan. 111, 238 P.2d 472 (1951); *McGraw v. Home Ins. Co.*, 93 Kan. 482, 144 P. 821 (1914).

A policy prohibition against increasing the risk applies to anything done by the insured, but does not apply to things done by a third person, on adjoining property, and of which the insured may have been unaware. *German Ins. Co. v. Wright*, 6 Kan.App. 611, 49 P. 704 (1897).

A clause making a fire insurance policy payable to named insureds as their interest may appear refers to the interests existing at the time of the loss. *New Hampshire Ins. Co. v. American Employers Ins. Co.*, 208 Kan. 532, 536, 492 P.2d 1322 (1972).

124.46

DESTRUCTION OF IMPROVEMENTS ON REAL PROPERTY

A building is “wholly destroyed” when it is damaged to the extent that no substantial portion of the structure left standing can be reasonably used in its reconstruction.

Notes on Use

The Kansas “valued policy law,” K.S.A. 40-905, provides:

Whenever any policy of insurance shall be written to insure any improvements upon real property in this state against loss by fire, tornado or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages, and the payment of money as a premium for insurance shall be prima facie evidence that the party paying such insurance is the owner of the property insured.

An insurance company may set out fraud in obtaining the policy as a defense to a lawsuit based on the policy.

For Measure of Damage instructions when the property is not wholly destroyed, see PIK 4th 171.10 and 171.11 (Personal Property), PIK 4th 171.20 and 171.21 (Real Estate), and PIK 4th 124.47 (Actual Cash Value).

Comment

Whether or not a building is wholly destroyed is a question for the trier of facts. For authority for the instruction, see *McKenzie v. Fidelity-Phoenix Fire Ins. Co.*, 133 Kan. 721, 3 P.2d 477 (1931); *Liverpool & London & Globe Ins. Co. v. Heckman*, 64 Kan. 388, 67 P. 879 (1902).

“Total loss” and “wholly destroyed,” when applied to insurance, are equivalents. “Total loss” does not mean the complete annihilation or extinction of the property insured, and the term does not mean that the portion of the property remaining after loss has no value for any purpose whatever. *Kinzer v. National Mut. Ins. Co.*, 88 Kan. 93, 127 P. 762 (1912); *Liverpool & London & Globe Ins. Co. v. Heckman*, 64 Kan. 388, 67 P. 879 (1902). Although some portion of the building may remain after a casualty, yet if such portion cannot be reasonably used to advantage in the reconstruction of the building, or will not, for some purpose, bring more money than sufficient to remove the ruins, the building is, in contemplation of the law, a “total loss” or “wholly destroyed.” This may be described as a “constructive total loss” if the cost of restoring the building to its insured use is more than the amount of the policy. *Liverpool & London & Globe Ins. Co. v. Heckman*, 64 Kan. 388, 67 P. 879 (1902).

124.47

ACTUAL CASH VALUE

Under the terms of the insurance policy, the defendant company insured the plaintiff against loss to *(his) (her)* property by *(fire) (windstorm) (tornado) (other)* to the extent of (“the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss ... “)

Under this provision of the policy, the plaintiff is entitled to recover the amount of the actual loss.

Notes on Use

The quotation in the parenthesis states the usual policy provision relating to “actual cash value.” A direct quotation from the policy should be used.

See PIK 4th 131.05 for definition of market value; PIK 4th 171.10 and 171.21 for measure of damage instruction relating to property; and PIK 4th 131.08 relating to property having no market value.

Comment

An “actual cash value” provision in a fire insurance policy covering personal property (wheat) was taken to mean market price less hauling in *Lambert v. St. Paul Fire & Marine Ins. Co.*, 178 Kan. 533, 289 P.2d 1057 (1955).

When applied to a partial loss, the term “actual cash value” in a homeowner’s policy means repair without a reduction for depreciation for the materials used unless specific policy provisions or a course of dealing indicate otherwise. *Thomas v. American Family Mut. Ins. Co.*, 233 Kan. 775, 666 P.2d 676 (1983).

124.48**“DIRECT LOSS” BY FIRE**

A “direct loss” by fire includes loss caused by smoke, heat, and water.

Comment

For a discussion of proximate cause and direct loss relating to insurance law, see 43 Am. Jur. 2d, Insurance § 477; and for smoke, heat, and water damage, see 43 Am. Jur. 2d, Insurance §§ 478-481; C.J.S., Insurance §§ 809-813.

E. EMPLOYMENT CONTRACTS

124.51

EMPLOYMENT CONTRACT—GENERALLY

An employer is obligated to pay (*his*) (*her*) employee the compensation agreed upon. In the absence of an agreement fixing the compensation, the law implies a promise by the employer to pay the employee what the services are reasonably worth.

Notes on Use

For definitions of contract and formation of contracts, see PIK 4th 124.01-124.03.

Comment

The acceptance of the benefit of the services of another generally implies a contract to pay for such services. *State, ex rel. v. Glenn*, 144 Kan. 461, 61 P.2d 1354 (1936).

A tenant who was induced to plow and sow under a contract that was void under the statute of frauds was permitted to recover under quantum meruit in *Nelson v. Street*, 148 Kan. 587, 83 P.2d 793 (1938).

An oral contract for employment not to be performed within one year from the making thereof may be unenforceable under the statute of frauds, K.S.A. 33-106. Part performance of such a contract does not take it out of the statute, since the equitable doctrine of part performance applies only to land contracts. *Manning v. Woods*, 187 Kan. 418, 422, 357 P.2d 757 (1960). But if a party has completed his performance, and nothing remains to be done but to pay him, the contract is enforceable. *Richard v. Kilborn*, 150 Kan. 579, 584, 95 P.2d 545 (1939); *Kinser v. Bennett, Admr.*, 163 Kan. 725, 728, 186 P.2d 284 (1947). A contract to employ for life, being possible of execution within a year, is enforceable and not within the statute of frauds. *Pierson v. Kingman Milling Co.*, 91 Kan. 775, 778, 139 P. 394 (1914), *reh. denied* 92 Kan. 468, 140 P. 1033 (1914). Likewise, a contract of hiring which fixes no definite time for its termination is not within the statute. *Talbott v. Gaty*, 171 Kan. 136, 141, 231 P.2d 202 (1951).

A person is not an employee by virtue of the fact that he does work or performs services for another merely as a favor. *St. Aubyn v. Thogmartin*, 206 Kan. 62, 67, 476 P.2d 248 (1970).

When an employee is made aware of a company policy that is part of the terms of the employment contract, the employee will be held to those terms. *Sweet v. Stormont Vail Regional Medical Center*, 231 Kan. 604, 647 P.2d 1274 (1982).

124.52

DISCHARGE OF EMPLOYEE

Where there is a contract of employment fixing a definite term of service between the parties, the employer may for legal cause discharge the employee (or terminate the employment relationship) prior to the expiration of the agreed term.

An employer has legal cause to dismiss an employee during the agreed term of employment if the employee _____ (insert one or more of the following)

performs (his) (her) contractual obligation in such a way as to deprive the employer of an essential part of the performance for which the employer bargained; or

fails to perform (his) (her) duties with competency, efficiency, honesty, and with faithfulness to (his) (her) employer's interests. [An employee is bound to exercise good faith toward (his) (her) employer. (He) (She) cannot (retain profits or earnings received in the course of performance of the employer's business) (solicit employment or perform services in an undertaking which is competitive with or prejudicial to the employer's business) while in the employer's service and without the employer's consent.]

Comment

The ordinary contract of employment is terminable at the will of either party. Under such a contract, the employee has no cause of action for breach of contract if he is discharged. Exceptions are contracts for definite terms or with specific restraints on termination, and statutes, lawful administrative regulations, or collective bargaining agreements between employer and employees regulating termination. *May v. Santa Fe Trail Transportation Co.*, 189 Kan. 419, 370 P.2d 390 (1962).

For an action to recover wages where an employer by counterclaim sought to recover for breach of a written agreement not to compete, see *Ferraro v. Fink*, 191 Kan. 53, 379 P.2d 266 (1963).

PIK 18.52 [PIK 4th 124.52] is cited with approval in *Munsell v. Ideal Food Stores*, 208 Kan. 909, 926, 494 P.2d 1063 (1972).

Employment-at-will contracts do not impose upon the parties a duty of good faith and fair dealing in the performance and enforcement of the contract. *Greenlee v. Board of Clay County Comm'rs*, 241 Kan. 802, 740 P.2d 606 (1987); *Morriss v. Coleman Co.*, 241 Kan. 501, 738 P.2d 841 (1987); *Dickens v. Snodgrass, Dunlap & Co.*, 255 Kan. 164, 872 P.2d 252 (1994).

No cause of action for promissory estoppel is stated absent evidence of the requisite detrimental reliance. *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988); *Lorson v. Falcon Coach, Inc.*, 214 Kan. 670, 552 P.2d 449 (1974). See PIK 4th 124.13 for additional comment on the theory of promissory estoppel.

Fraudulent inducement in the employment context must be alleged with particularity. *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988).

No cause of action for the tort of outrage is stated absent evidence of extreme and outrageous conduct. *Polson v. Davis*, 635 F. Supp. 1130 (D. Kan. 1986).

124.53

EMPLOYMENT AT WILL CONTRACT—DEFINITION

An employment-at-will contract is an employment agreement of indefinite duration between an employer and employee that can be terminated at any time without legal liability at the will of either the employer or employee.

Notes on Use

Authority for the instruction is found in *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976). In *Johnson* the court set forth the general rule that in the absence of a contract, express or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party.

The instruction should be given whenever there is an issue concerning an employment-at-will contract.

Comment

Under the American common law, an employer may discharge his at-will employee for good cause, for no cause, or even for wrong cause, without incurring liability to the employee for wrongful discharge. *Morriss v. Coleman Co.*, 241 Kan. 501, 508, 738 P.2d 841 (1987); *Kansas Baptist Convention v. Mesa Operating Limited Partnership*, 253 Kan. 717, 864 P.2d 204 (1993).

The mere fact that an employee has not been previously terminated under written contractual employment-at-will provisions does not create an implied contract for continuing employment. *Dickens v. Snodgrass, Dunlap & Co.*, 255 Kan. 164, 872 P.2d 252 (1994).

In *St. Catherine Hospital of Garden City v. Rodriguez*, 25 Kan. App. 2d 763, 971 P.2d 754 (1998), the court held that when an agreement provides for termination by either party, without cause, by the giving of a written notice within a specific time and the agreement has been terminated precisely as required by its terms, the implied duties of good faith and fair dealing do not arise.

124.54

DISCHARGE OF EMPLOYEE—MEASURE OF DAMAGES

If you find for the plaintiff, then you should award such sum as you believe will fairly and justly compensate (*him*) (*her*) for the damages you believe (*he*) (*she*) sustained as a direct result of the breach of the employment contract by the defendant.

In determining plaintiff's damages, you should consider any of the following elements that you find were a direct result of the breach:

[List here the elements of damage claimed by the plaintiff and supported by the evidence.]

The total amount of your verdict may not exceed the sum of \$_____, the amount of plaintiff's claim.

Notes on Use

The court should determine the elements of damage that are properly recoverable as a matter of law, and list them in the instruction. The need for this instruction is stated in *Munsell v. Ideal Food Stores*, 208 Kan. 909, 926, 494 P.2d 1063 (1972).

Comment

An employee who has been wrongfully discharged has two separate remedies to pursue. He may treat the contract as rescinded and sue in quantum meruit for the value of his services actually rendered, or bring an action for breach of contract for damages that are the natural and direct result of the breach. See 27 Am. Jur. 2d, Employment Relationship § 40; *Challis v. Hartloff*, 136 Kan. 823, 827, 18 P.2d 199 (1933). In *Rench v. Hayes Equipment Mfg. Co.*, 134 Kan. 865, 8 P.2d 346 (1932), the plaintiff was allowed to recover the amount of salary he lost between the time of wrongful discharge and the date of his new employment, and that amount he reasonably expended in searching for new employment. He was not allowed the expenses for coming to and from Wisconsin, his home, to his place of employment. See also *Masterson v. Boliden-Allis, Inc.*, 19 Kan. App. 2d 23, 865 P.2d 1031 (1993).

A liquidated damages clause is valid and enforceable, even though phrased in language of penalty, if the amount stipulated is conscionable and the nature of the transaction is such that the amount of actual damages resulting from default would not be easily determined. *U.S.D. No. 315 v. DeWerff*, 6 Kan. App. 2d 77, 626 P.2d 1206 (1981).

“[A] common-law retaliation claim may be premised on any employment action that is materially adverse to a reasonable employee, i.e., ‘harmful to the point that [it] could well dissuade a reasonable worker from’ exercising the worker’s rights under the Civil Service Act.” *Hill v. State* 310 Kan. 490, 505, 448 P.3d 457 (2019), relying on *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57, 126 S. Ct. 2405, 165 L.Ed.2d 345 (2006). The Kansas Supreme Court held that Hill could “premise a claim for relief on an employment action short of firing him, reducing his wages or benefits, or diminishing his workplace status.” 310 Kan. at 505.

124.55

WRONGFUL DISCHARGE—IMPLIED CONTRACT

An implied contract not to discharge an employee except for just cause may be proved from facts and circumstances showing mutual intent of the parties. It is, therefore, distinguishable from an employment-at-will contract.

The understanding and intent of the parties may be ascertained from several factors which include: _____ (*Insert applicable options*)

- **written or oral negotiations;**
- **the conduct of the parties from the commencement of the employment relationship;**
- **the usage of the business;**
- **the situation and objective of the parties giving rise to the relationship;**
- **the nature of the employment;**
- **any other circumstances surrounding the employment relationship that would tend to explain or make clear the intention of the parties.**

Notes on Use

The authority for this instruction is found in *Allegri v. Providence-St. Margaret Health Center*, 9 Kan. App. 2d 659 663-64, 684 P.2d 1031 (1984); *Morriss v. Coleman Co.*, 241 Kan. 501, 513, 738 P.2d 841 (1987). For definitions of contract, formation of contracts, and measure of damages for breach of contract, see PIK 4th 124.01, 124.03, 124.04, and 124.16.

The authority for the standard of just cause is *Morriss v. Coleman Co.*, 241 Kan. 501, 513-14, 738 P.2d 841 (1987).

Comment

A contract implied-in-fact arises from facts and circumstances showing mutual intent to contract. *Mai v. Youtsey*, 231 Kan. 419, 422, 646 P.2d 475 (1982). In an implied contract, one or more of the terms and conditions are implied from the conduct of the parties. See *Williams v. Jones*, 105 Kan. 282, 182 P. 391 (1919).

Implied-in-fact contracts need not be formally or explicitly stated in words. *Morriss v. Coleman Co.*, 241 Kan. 501, 513, 738 P.2d 841 (1987); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976); *Allegri v. Providence-St. Margaret Health Center*, 9 Kan. App. 2d 659, 684 P.2d 1031 (1984). Evidence establishing discharge for cause coupled with an absence of evidence of an implied employment contract precluded recovery on a breach of contract claim. *Batt v. Globe Engineering Co.*, 13 Kan. App. 2d 500, 774 P.2d 371 (1989) (complete lack of evidence concerning employer's intentions on issuing employment policy).

An employment manual that is only a unilateral expression of company policy and is not bargained for cannot be the sole basis of an implied employment contract. *Rouse v. Peoples Natural Gas Co.*, 605 F. Supp. 230 (D. Kan. 1985); *Kastner v. Blue Cross & Blue Shield of Kansas, Inc.*, 21 Kan. App. 2d 16, 894 P.2d 909 (1995). See also *Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988) (implied contract not created by employer's disciplinary letter stating that the employee would be terminated for any further serious misconduct). The mere fact that an employee has not been previously terminated under written contractual employment-at-will provisions does not create an implied contract for continuing employment. *Dickens v. Snodgrass, Dunlap & Co.*, 255 Kan. 164, 872 P.2d 252 (1994).

In *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 4 P.3d 1149 (2000), the court held that a disclaimer in an employer's manual is not determinative as a matter of law on the issue of whether there is an implied contract of employment where the disclaimer is expressly or impliedly contradicted by other provisions in the manual, statements made by the employer, or other documents. The court referred to all the factors contained in PIK 3d 124.55 [now PIK 4th 124.55] as being proper for a jury to consider in determining the intent of the parties.

The determination of whether an implied-in-fact contract exists is a question of fact for the jury to decide. The intent of the parties need not be established by direct proof but can be shown by acts, circumstances, and inferences reasonably drawn therefrom. *Stover v. Superior Industries Int'l, Inc.*, 29 Kan. App. 2d 235, 238-39, 29 P.3d 967, *rev. denied* 270 Kan. 903 (2000). However, the determination of whether an implied-in-fact employment contract exists is not a question of fact for the jury to decide when the employee only presents evidence of his or her unilateral expectations of continued employment. If the employee cannot provide evidence beyond a unilateral expectation of employment, summary judgment may be appropriate. *Inscho v. Exide Corp.*, 29 Kan. App. 2d 892, 896, 33 P.3d 249 (2001) *rev. denied* 273 Kan. 1036 (2002).

124.56

WRONGFUL DISCHARGE—RETALIATORY DISCHARGE OR DEMOTION

An employee may recover for retaliatory (*discharge*) (*demotion*) if the facts and circumstances prove that the employee’s (*termination*) (*demotion*) was based on retaliation. Retaliatory (*discharge*) (*demotion*) may be proved by a showing that the employee was (*terminated*) (*demoted*) because _____ (*insert one or more of the following*)

- **the employee refused to violate a criminal statute which provided (*insert relevant language of criminal statute*).**
- **the employee exercised a statutory right to (*insert language of relevant statutory right*).**
- **the employee complied with the statutory duty of (*insert language of relevant statutory duty*).**
- **the employer violated (*insert statutory cite*), a (*state*) (*federal*) statute prohibiting (*discharge*) (*demotion*).**
- **the employee exercised a constitutional right to (*insert language of relevant constitutional right*).**

Notes on Use

Authority for this instruction is found in *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 808, 752 P.2d 645 (1988), and *Allegri v. Providence-St. Margaret Health Center*, 9 Kan. App. 2d 659, 664, 684 P.2d 1031 (1984). The court should first determine as a matter of law whether a public policy prohibits the actions alleged by the plaintiff and, if found, instruct the jury that if they find that the facts support the plaintiff’s theory of retaliation, such action is prohibited by said policy and plaintiff may recover. The need for this prerequisite finding is suggested in *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 808, 752 P.2d 645 (1988).

When using bullet number 4 of the instruction, whenever the word “retaliatory” is used it should be replaced with the word “wrongful.”

Claimants are required to prove a claim for retaliatory discharge by clear and convincing evidence. *Ortega v. IBP, Inc.*, 255 Kan. 513, 874 P.2d 1188 (1994). See PIK 4th 102.11, Burden of Proof—Clear and Convincing.

Comment

Termination of an employee in retaliation for the good faith reporting of a serious infraction of the law by a co-worker or an employer to either company management or law enforcement officials (“whistleblowing”) is an actionable tort. *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988). See also *Moyer v. Allen Freight Lines, Inc.*, 20 Kan. App. 2d 203, 885 P.2d 391 (1994), where the dissent contends that the language in *Palmer* recognizing a cause of action of retaliatory discharge for “internal whistle blowing” is mere dicta.

“[A] common-law retaliation claim may be premised on any employment action that is materially adverse to a reasonable employee, i.e., ‘harmful to the point that [it] could well dissuade a reasonable worker from’ exercising the worker’s rights under the Civil Service Act.” *Hill v. State*, 310 Kan. 490, 505, 448 P.3d 457 (2019), quoting from *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57, 126 S. Ct. 2405, 165 L.Ed.2d 345 (2006). The Kansas Supreme Court held that the employee could premise a claim for relief on an employment action short of firing, reducing wages or benefits, or diminishing workplace status. 310 Kan. at 505.

Termination of an employee in retaliation for the filing of a workmen’s compensation claim is an actionable tort. *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); *Chrisman v. Philips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140 (1988) (discharge because of employee’s intent to file a claim actionable).

Employees protected contractually from retaliatory discharge by a collective bargaining agreement may recover damages. *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988) (overruling *Cox v. United Technologies, Inc.*, 240 Kan. 95, 727 P.2d 456 (1986), and *Armstrong v. Goldblatt Tool Co.*, 242 Kan. 164, 747 P.2d 119 (1987)).

Termination of an employee in retaliation for supporting equal employment opportunities or opposing racial discrimination, activities that are protected by the civil rights statute, is an actionable tort. *Harris v. First Nat. Bank of Hutchinson, Kan.*, 680 F. Supp. 1489 (D. Kan. 1987).

Termination of a public employee for exercising protected First Amendment rights (writing to the Kansas Attorney General about matters concerning the police department) entitles one to monetary damages. *Wulf v. City of Wichita*, 644 F. Supp. 1211 (D. Kan. 1986); *Riddle v. City of Ottawa*, 12 Kan. App. 2d 714, 754 P.2d 465 (1988) (employee stated cause of action by alleging suspension in retaliation for exercise of free speech). In such a case, the trial court must first determine whether the employee’s speech can be characterized as addressing a matter of public concern. If so, the court must then balance the interest of the employee against the interest of the employer in effectively and efficiently fulfilling its responsibilities to the public. If the employee’s claims survive these threshold determinations by the court, the employee’s case should be submitted to a jury properly instructed on the claims presented. *Dennis v. Ruskowitz*, 19 Kan. App. 2d 515, 873 P.2d 199 (1994).

In a case involving whistle blowing and free speech retaliatory discharge claims by a terminated attorney for a state agency, the court found the attorney used poor judgment and did not take steps that a reasonably prudent attorney would have taken prior to reporting suspected violations to an outside federal agency, thus destroying the attorney’s effectiveness with the state agency. When close working relationships (such as an attorney-client relationship) are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate. In this case, the governmental interest prevailed over any First Amendment rights that may have been involved. *Crandon v. State*, 257 Kan. 727, 897 P.2d 92 (1995).

The internal loan policies, guidelines, or underwriting standards of a savings & loan association are not “rules, regulations, or the law pertaining to the public health, safety and the general welfare,” and being discharged for reporting a violation thereof cannot be the basis for a retaliatory discharge claim. *Herman v. Western Financial Corp.*, 254 Kan. 870, 869 P.2d 696 (1994).

In *Brigham v. Dillon Companies, Inc.*, 262 Kan. 12, 935 P.2d 1054 (1997), the Kansas Supreme Court recognized the tort of retaliatory demotion concluding that such an action is a logical and necessary extension of the tort of retaliatory discharge.

F. BROKERAGE CONTRACTS

124.61

DUTY OF SELLER'S OR LANDLORD'S REAL ESTATE BROKER

A licensed real estate broker employed to *(sell) (lease)* property is entitled to a commission if: _____ *(insert applicable paragraph)*

- ***[(he) (she)] produces a buyer who is ready, willing, and able to (purchase) (lease) the property (upon the seller's specified terms) (upon terms acceptable to the seller). This is true even though a sale was not completed, if the failure to complete the transaction was the fault of the seller.]***
- ***[(his) (her)] activities result in a sale of the property.]***

Notes on Use

This instruction must be modified to conform to the issues.

Comment

An able buyer is one with the financial capability to buy. A buyer is not willing if the buyer unjustifiably refuses or is financially unable to perform at the time of the closing. *Moody Investments, Inc. v. Baldwin*, 12 Kan. App. 2d 686, 754 P.2d 810 (1988).

A real estate broker, to bring and maintain an action, has the burden of proving that, at the time the cause of action arose, he was duly licensed. K.S.A. 58-3019; *Deines v. Frevert*, 170 Kan. 278, 224 P.2d 1023 (1950).

Where a broker has an exclusive right to sell for a definite term and fails to procure a purchaser, and the owner during the term sells through a second broker, the first broker is not entitled to a commission, but he is entitled to recover damages for breach of contract. *Isern v. Gordon*, 127 Kan. 296, 273 P. 435 (1929).

The general rule is that a real estate broker, having either an exclusive or a general listing, is entitled to a commission only when he produces a buyer who is ready, able, and willing to purchase upon terms proffered by or acceptable to his principal. *Isern v. Gordon*, 127 Kan. 296, 273 P. 435 (1929); *Hiniger v. Judy*, 194 Kan. 155, 398 P.2d 305 (1965); *Graber v. Tennant*, 173 Kan. 577, 250 P.2d 816 (1952); *Martin v. Weidman*, 199 Kan. 716, 433 P.2d 459 (1967). This is true although the sale is not consummated. The refusal of the seller to complete the sale will not defeat the agent's right to a commission. *Green v. Fist*, 89 Kan. 536, 132 P. 179 (1913). It is not necessary that the broker handle all of the details. It is sufficient if he procures the buyer and lets the principal make the sale. Where, however, the broker procures a buyer who takes only an option, which is never exercised, the broker is not entitled to a commission. *Hedges v. Keas*, 180 Kan. 540, 306 P.2d 181, *modified on other grounds and reh. denied*, 181 Kan. 503, 313 P.2d 264 (1957). The transfer of title is not required for a complete sale entitling the broker to a commission.

If a broker is otherwise entitled to a commission, the seller cannot defeat that right by closing the deal himself. The question of whether a broker is the "efficient and procuring cause of a consummated

deal” is one to be determined by the trier of facts in the light of all of the circumstances. *Martin v. Weidman*, 199 Kan. 716, 433 P.2d 459 (1967).

An owner who has knowledge that a broker with whom he has listed his property has interested a prospective customer cannot defeat the broker’s right to a commission by closing the deal himself or through another broker, and the payment of a commission to another broker is not sufficient to avoid the liability to the first broker, if he was the efficient, procuring cause of the sale. *DeYoung v. Reiling*, 165 Kan. 721, 725, 199 P.2d 492 (1948).

Where no time limit is specified by the contract of employment, the broker must act within a reasonable time. 12 Am. Jur. 2d, Brokers §§ 54-57.

A decision based on quantum meruit is appropriate where there is no express agreement on the amount of the commission. *Hand Realty Co. v. Meyers*, 234 Kan. 304, 672 P.2d 583 (1983). Also see Quantum Meruit instruction, PIK 4th 124.17.

A fiduciary relationship may exist between a prospective purchaser and a real estate broker if an express or implied contract creating an agency relationship is shown. *Stevens v. Jayhawk Realty Co.*, 9 Kan. App. 2d 338, 677 P.2d 1019, *aff’d* 236 Kan. 90, 689 P.2d 786 (1984); *Johnson v. Geer Real Estate Co.*, 239 Kan. 324, 720 P.2d 660 (1986); *Bannon v. Kansas Real Estate Comm’n*, 12 Kan. App. 2d 54, 733 P.2d 330 (1987).

For description of general duties that a real estate broker owes to seller, see *Marcotte Realty & Auction, Inc. v. Schumacher*, 229 Kan. 252, 624 P.2d 420 (1981). See K.S.A. 58-30,106 for the minimum duties and obligations a seller’s or landlord’s agent owes to the seller or landlord. See K.S.A. 58-30,107 for the minimum duties and obligations a buyer’s or tenant’s agent owes to a buyer or tenant. See K.S.A. 58-30,108 for the minimum duties and obligations a licensee owes as a dual agent of both the buyer and seller. See K.S.A. 58-3062 for acts a licensed broker or salesperson is prohibited from doing.

124.62

DUTY OF BUYER'S OR TENANT'S REAL ESTATE BROKER

A licensed real estate broker employed as a *(buyer's) (tenant's)* agent to *(sell) (lease)* property is entitled to a commission if _____ *(insert applicable paragraph)*

- *[(he) (she)] produces a seller who is ready, willing, and able to (sell) (lease) a property acceptable to the (buyer) (tenant) and (upon the [buyer's] [tenant's] specified terms) (upon terms acceptable to the [buyer] [tenant]). This is true even though a (purchase) (lease) was not completed, if the failure to complete the transaction was the fault of the (buyer) (tenant).]*
- *[(his) (her)] activities result in a (purchase) (lease) of the property.*

Notes on Use

This instruction must be modified to conform to the issues.

G. BAILMENTS

124.71

DEFINITION OF BAILMENT

A bailment is the *(delivery and acceptance) (obtaining of possession)* of personal property for a particular purpose without a transfer of ownership.

The “Bailor” is the person who *(delivers) (owns)* the property.

The “Bailee” is the person who *(receives) (obtains)* possession of the property.

[In this case _____ *(insert name)* *(is the bailor)* *(claims that [he] [she] is the bailor)* and _____ *(insert name)* *(is the bailee)* *(claims that [he] [she] is the bailee)*]

Notes on Use

This instruction should be given in all cases involving a bailment claim. Omit phrases in parenthesis that are not applicable. The words or phrases “obtaining of possession,” “owns,” and “obtains” should be used when the claim involves a constructive bailment, *i.e.*, in instances where the bailee obtains possession of personal property without a prior understanding with the bailor. If there is an issue concerning the claim of being the bailor or the bailee, the applicable parenthesis in the bracketed paragraph should be given.

This instruction is framed under common law concepts of bailment. Therefore, if the claim involves subject matter that has been codified by the Uniform Commercial Code, the instruction should be modified accordingly.

Comment

Authority for the instruction is found in *Schoonover v. Igleheart Bros.*, 163 Kan. 689, 186 P.2d 109 (1947), and *M. Bruenger & Co., Inc. v. Dodge City Truck Stop, Inc.*, 234 Kan. 682, 675 P.2d 864 (1984). In *Schoonover*, the Kansas Supreme Court defined bailments as:

“[A] delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.” 163 Kan. at 693 (quoting from 8 C.J.S., Bailments, § 1).

This is the traditional definition which treats the bailment transaction as one arising out of contract. However, Professor Williston in his treatise on contracts defines bailments more broadly “as the rightful possession of goods by one who is not the owner.” 9 Williston on Contracts (3d ed.) p 1030. This view, which is supported by other learned authors, is based on the reality that many bailments are not rounded on contract. The typical reference being constructive bailments where a bailee obtains possession of personal property without an understanding with the bailor. In such cases the contract elements of mutual assent and

consideration are lacking. For an excellent discussion of the two views see Brown and Raushenbush, Law of Personal Property (3d ed.) § 10.1.

A bailment is different from a sale in that in a sale the title to the property passes to the purchaser, whereas in a bailment title remains in the bailor. *Kansas Flour Mills Co. v. Harper County Comm'rs*, 124 Kan. 312, 259 P. 795 (1927); *Bank v. McIntosh*, 72 Kan. 603, 84 P. 535 (1906).

A trust is distinguished from a bailment in that the trustee acquires legal title to the trust res for the purpose of performing his duties. A bailee, on the other hand, has only possession of the property. See 8 Am. Jur. 2d, Bailments § 29.

A bailee is estopped from denying the bailor's title to property. See *Thompson v. Williams*, 30 Kan. 114, 1 P. 47 (1883).

124.72

BAILMENT—DUTY OF CARE BY BAILEE

When the purpose of the bailment has been fulfilled, a bailee has the duty to [exercise ordinary care in safeguarding the bailor's property while in (his) (her) care] [to return the property to the bailor] [to return the property to the bailor in as good as condition as received, reasonable wear and tear excepted]. A breach of (this duty) (these duties) constitutes negligence.

Notes on Use

This instruction should be given in all bailment claims concerning the negligence of the bailee. This includes the three traditional classes of bailments, namely: sole benefit of the bailee, sole benefit of the bailor, and mutual benefit for both. The bracketed words should be given when applicable. In addition, PIK 4th 103.01, Negligence Defined, should be given.

Comment

Authority for this instruction is *Maddock v. Riggs*, 106 Kan. 808, 190 P. 12 (1920). In *Maddock*, the Kansas Supreme Court stated:

“The modern theory, adopted by many courts, is, that there are no degrees of care or of negligence; that negligence is in all cases the same thing, namely, the absence of due care. ‘The tendency of modern judicial opinion is adverse to the distinction between gross and ordinary negligence.’ [Citation omitted].

...

“[W]hether he exercised due care in view of all the circumstances, it is apparent that the so-called distinction between slight, ordinary and gross negligence over which courts have quibbled for a hundred years can furnish no assistance. Of course, the law did not impose upon him the responsibility of an insurer, nor require of him the exercise of anything unreasonable.... “ 106 Kan. at 816.

The decision in *Maddock* confronts a problem that has plagued the courts for years over the classification of bailments and the duty of care of a bailee over bailed property. The early common law recognized six classifications along with six duties of care. This scheme is attributed to the celebrated case of *Coggs v. Bernard*, 2 Ld Raym (Eng) 909 (1703), in which Chief Justice Holt by a separate opinion examined in depth the question of the bailee's liability. See Brown and Raushenbush, *Law of Personal Property* (3d ed.) § 11.1. Over the years the scheme lost favor and was replaced by another classification that was derived in part from the decision of Justice Holt and from a view adopted by Justice Story. See Brown, *supra*, at p. 255. The latter view is the common law of most states today. It divides bailments into three classifications: sole benefit of the bailor; sole benefit of the bailee; and the mutual benefit of both. Under this classification the duty of the bailee depends upon which party derives the greater benefit.

If the bailment is for the sole benefit of the bailor, the bailee has a duty to exercise slight care. If the bailment is for the sole benefit of the bailee, the bailee has a duty of great care. If the bailment is mutual or for the benefit of both, the bailee has a duty to exercise ordinary care. While it represents a great improvement over the early common law, the application of the rule has created problems. One learned author states:

“These difficulties, both conceptual in terms of theory and practical in terms of how to instruct a jury, have led to some discontentment with the three classes of bailments and the accompanying three standards of care. It would be more understandable and easier to administer if, regardless of the nature of the bailment, the bailee were held to a standard of ‘ordinary care under the circumstances’ which could be considered in judging whether the bailee’s conduct met the standard. Some courts have so held.” Brown, *supra*, 11.1, at p. 256-257.

Maddock is listed as authority for the modern view.

In *Bank v. McCutchan*, 111 Kan. 682, 687, 208 P. 636 (1922), the Kansas Supreme Court held that the trial court did not commit error by failure to instruct on the various degrees of negligence in a bailment of securities. The court referred to a prior appeal in the case, *Bank v. Bank*, 106 Kan. 303, 187 P. 697 (1920), wherein it had determined that “a national bank is liable for the negligent loss of property entrusted to it for disposition according to instructions whether the bailment be for a profit or merely for accommodation of its customers.” 111 Kan. at 683.

Where bailed property is damaged in the possession of the bailee as the result of the bailee’s negligence, the bailor has a choice of remedies. The bailor may elect to affirm the contract, waive the tort, and bring his action in contract; or he may abandon the contract and proceed against the bailee in an action in tort based upon the negligence of the bailee. See *Nolan v. Auto Transporters*, 226 Kan. 176, 183, 597 P.2d 614 (1979).

The bailee in a bailment for mutual benefit must use ordinary care in safeguarding the property in order to prevent its damage or theft. *M. Bruenger & Co., Inc. v. Dodge City Truck Stop, Inc.*, 234 Kan. 682, 675 P.2d 864 (1984).

124.73

**BAILMENT—NEGLIGENCE OF THE BAILEE—
BURDEN OF PROOF**

When bailed property is destroyed or damaged while in the exclusive possession and control of the bailee, the law presumes the bailee's negligence to be the cause of the loss and the bailee has the burden to prove that the loss was due to other causes consistent with due care on *(his) (her)* part.

Notes on Use

The instruction should be given with PIK 4th 124.17, Measure of Damages Under Quantum Meruit, and 124.72, Bailment—Duty of Care By Bailee, when applicable.

Comment

Authority for this instruction is *Nolan v. Auto Transporters*, 226 Kan. 176, 183, 597 P.2d 614 (1979). Also see *Farm Bureau Mutual Ins. Co. v. Schmidt*, 201 Kan. 621, 443 P.2d 254 (1968); *Virginia Surety Co. v. Schlegel*, 200 Kan. 64, 434 P.2d 772 (1967); 8 Am. Jur. 2d, Bailments §§ 322, 232.

A bailee is not an insurer of the safety of the property of the bailor, regardless of the nature of the bailment. *Global Tank Trailer Sales v. Textilana-Nease, Inc.*, 209 Kan. 314, 317, 496 P.2d 1292 (1972).

The bailor has made a prima facie case of negligence against the bailee if the bailor shows that the property was delivered and the bailee has failed to return it. A presumption of negligence on the part of the bailee arises and the bailee has the burden of going forward with evidence to explain the failure to redeliver. *M. Bruenger & Co., Inc. v. Dodge City Truck Stop, Inc.*, 234 Kan. 682, 675 P.2d 864 (1984).

124.74

**BAILMENT—INHERENTLY DANGEROUS PROPERTY—
DUTY OF BAILOR TO WARN**

A bailor who knows, or by the exercise of ordinary care should know, that personal property delivered to a bailee is inherently dangerous, has a duty to give adequate warning of such danger when injury can be reasonably anticipated if an adequate warning is not given. Failure to so warn constitutes negligence.

Notes on Use

Authority for the instruction is found in 8 Am. Jur. 2d, Bailments §§ 156, 166.

This instruction should be given with PIK 4th 124.71, Definition of Bailment, and PIK 4th 103.01, Negligence Defined, when the claim is based on the theory of negligence of a bailor in failing to warn the bailee of an inherently dangerous instrumentality. If the negligence of both bailor and bailee is presented, the applicable instructions concerning comparative fault of the parties as contained in Chapter 105.00 must be given

Comment

The duty of the bailor to warn of the dangers inherent in such an instrumentality extends to gratuitous bailments as well as bailments for hire. 8 Am. Jur. 2d, Bailments §§ 156, 162. The liability of the bailor is based on his superior knowledge of the dangerous character of the chattel. *Id.* at 166.

124.75

BAILMENT—IMPLIED WARRANTY OF FITNESS BY BAILOR

A bailor impliedly warrants that *(he)* *(she)* has made a reasonable inspection of bailment property and that it is fit for the purpose intended when, at the time of the bailment contract, *(he)* *(she)* has reason to know of any particular purpose for which the property is required and that the bailee is relying on *(his)* *(her)* skill or judgment to select or furnish suitable property.

A bailor who breaches this warranty is liable to any person who may reasonably be expected to use or to be affected by the property and is injured as a result.

Notes on Use

Authority for the instruction is *Global Tank Trailer Sales v. Textilana-Nease, Inc.*, 209 Kan. 314, 320, 496 P.2d 1292 (1972); *Corral v. Rollins Protective Services Co.*, 240 Kan. 678, 732 P.2d 1260 (1987).

This instruction should be given with PIK 4th 124.71, Definition of Bailment, when the claim is based on implied warranty of fitness.

Comment

In *Global Tank Trailer Sales v. Textilana-Nease, Inc.*, 209 Kan. 314, 320, 496 P.2d 1292 (1972), the Kansas Supreme Court stated:

“An implied warranty of fitness has been recognized in connection with bailments made for the mutual benefit of the parties.... The rule is that while the bailor is not an absolute insurer against injuries from a defective chattel, he is charged with the duty of inspection to determine whether or not the chattel is fit for the purpose intended. Thus, if the defect were discoverable, he became liable for injuries to the bailee, arising from this unsafe condition, under the theory of an implied warranty of fitness. [Citations omitted.]”

A bailee for hire may bring a cause of action in contract based on an implied warranty of fitness, or in tort for negligence in failing to use reasonable care to ascertain that the property was in fact suitable. See 8 Am. Jur. 2d, Bailments § 164.

For further comment see PIK 4th 128.10, Implied Warranty of Fitness for Particular Purpose.

124.76

BAILMENT—DUTY TO INSPECT BY BAILOR

A bailor has a duty to make a reasonable inspection of bailment property to determine that it is suitable for the purpose intended when, at the time of the bailment contract, *(he)* *(she)* knows or has reason to know of any particular purpose for which the property is required and that the bailee is relying on *(his)* *(her)* skill or judgment to select or furnish suitable property. What constitutes a reasonable inspection depends upon the nature of the property and all the circumstances. Failure to make a reasonable inspection constitutes negligence.

Notes on Use

Authority for the instruction is *Global Tank Trailer Sales v. Textilana-Nease, Inc.*, 209 Kan. 314, 496 P.2d 1292 (1972).

This instruction should be given with PIK 4th 124.71, Definition of Bailment, and PIK 4th 103.01, Negligence Defined, when the claim of a bailee for hire is based on the negligence of the bailor in making a reasonable inspection.

Comment

A bailee for hire may bring a cause of action in contract based on an implied warranty of fitness for failure to make the inspection, or in tort for negligence in failing to use reasonable care to ascertain that the property was in fact suitable. 8 Am. Jur. 2d, Bailments §§ 164, 165.

For further comment see PIK 4th 128.03, Duty to Inspect.

124.77

BAILMENT—CONTRIBUTORY NEGLIGENCE OF BAILEE

A bailee has a duty to exercise ordinary care for *(his) (her)* own safety and protection with reference to obvious defects and dangerous conditions of bailment property about which *(he) (she)* knows and understands or about which *(he) (she)* should know and understand. *(He) (She)* further has a duty to use the property in a normal manner in accordance with adequate instructions and warnings. Failure to fulfill any of these duties constitutes negligence.

Notes on Use

Authority for the instruction is found in *Shehi v. Southwest Rentals, Inc.*, 199 Kan. 265, 271, 428 P.2d 838 (1967).

The instruction is applicable when contributory negligence of the bailee is asserted as a defense upon a claim involving liability of the bailor for failing to warn or to make a reasonable inspection.

Comment

See PIK 4th 128.06, Duty of Buyer or Consumer.

124.78

**BAILMENT—UNREASONABLE USE AS A DEFENSE
TO IMPLIED WARRANTY OF FITNESS**

It is a defense to an action for breach of an implied warranty of fitness that the bailee or third party discovered the defect in the bailment property, became aware of the danger, and unreasonably continued to use the product.

Unreasonable use of the product is not a complete defense but may be considered by a jury in determining the comparative fault of the parties.

Notes on Use

The instruction is applicable when unreasonable use of the bailment property is asserted as a defense upon a claim involving liability of the bailor upon an implied warranty of fitness. 8 Am. Jur. 2d, Bailments § 163. The instruction embraces the principles of comparative fault of the parties under K.S.A. 60-258a and the applicability of the theory from *Kennedy v. City of Sawyer*, 4 Kan. App. 2d 545, 556, 608 P.2d 1379 (1980).

Comment

In *Kennedy v. City of Sawyer*, 4 Kan. App. 2d 545, 608 P.2d 1379 (1980), the Kansas Court of Appeals defined the degree of unreasonable use of a product which would bar recovery on a claim of breach of implied warranty as the “unreasonable encounter with a known risk.” The Supreme Court affirmed the appellate court’s conclusion that comparative fault principles applied to the defense of unreasonable use in implied warranty cases. *Kennedy v. City of Sawyer*, 228 Kan. 439, 450, 618 P.2d 788 (1980).

For further comment see PIK 4th 128.15, Implied Warranty of Fitness—Foreseeability—Multiple Causes.

124.79

BAILMENT—CONVERSION BY BAILEE

Conversion by the bailee is the intentional and unauthorized assumption and exercise of the right of ownership over goods or personal property belonging to the bailor under circumstances when the bailee _____ (*insert one or more of the following*)

- **made use of the property contrary to the terms of the bailment.**
- **destroyed the bailor’s property.**
- **appropriated the property to (*his*) (*her*) own use.**
- **gave the property to a third party in disregard of the bailor’s rights.**
- **withheld the property from the bailor under a claim of title that was inconsistent with the title of the bailor.**

As used in this instruction the word “intentional” means an intent to use or dispose of property.

Notes on Use

Authority for the instruction is found in *Watkins v. Layton*, 182 Kan. 702, 707, 324 P.2d 130 (1958); *Temmen v. Kent-Brown Chevrolet Co.*, 227 Kan. 45, 50, 605 P.2d 95 (1980); and *Nelson v. Hy-Grade Construction & Materials, Inc.*, 215 Kan. 631, 634, 527 P.2d 1059 (1974).

Common examples of conversion by a bailee are included in the bulleted selections. The applicable phrase should be selected or other acts of the bailee that are in derogation of the right of possession or title of the bailor should be stated.

Comment

A limitation of liability clause in a non-negotiable receipt or storage of goods agreement is not effective when loss results from conversion of goods. *Lipman v. Petersen*, 223 Kan. 483, 575 P.2d 19 (1978).

A party may embezzle property to which he or she has been entrusted as a bailee. *Bolton v. Souter*, 19 Kan. App. 2d 384, 872 P.2d 758 (1993).

124.80**BAILMENT—MEASURE OF DAMAGES****Comment**

The Committee believes that other pattern instructions adequately cover the proper measure of damages in the variety of bailment claims. If the claim concerns damage to personal property, the applicable instruction from PIK 4th 171.10, 171.11, or 171.12 should be given. If the claim involves personal injury due to the negligence of the bailor or breach of implied warranty, the applicable instruction in PIK 4th 171.02, 171.04, or 171.06 should be given. If comparative fault of the parties is involved, the applicable instructions from Chapter 105, Comparative Fault, should be given. If the claim involves a demand for punitive damages, PIK 4th 171.44, Punitive Damages, should be given.

For a general discussion of the measure of damages in bailment claims see *Nolan v. Auto Transporters*, 226 Kan. 176, 597 P.2d 614 (1979).

For further comment see PIK 4th 128.13, Measure of Damages—Warranty Cases.

124.81

BAILMENT—CONVERSION—MEASURE OF DAMAGES

The measure of damages for conversion of personal property is the fair and reasonable market value of the property converted at the time of the conversion.

Notes on Use

Authority for the instruction is found in *Nelson v. Hy-Grade Construction & Materials, Inc.*, 215 Kan. 631, 635, 527 P.2d 1059 (1974); and *Wingerson v. Tucker*, 175 Kan. 538, 265 P.2d 842 (1954).

The instruction should be given with PIK 4th 124.71, Definition of Bailment, and 124.79, Bailment—Conversion by Bailee, when applicable. If an additional claim for punitive damages is asserted, PIK 4th 171.44, Punitive Damages, should be used.

Comment

The basis for an award of punitive damages is stated by the Kansas Supreme Court in *Temmen v. Kent-Brown Chevrolet Co.*, 227 Kan. 45, 51, 605 P.2d 95 (1980); and *Cantrell v. R.D. Werner Co.*, 226 Kan. 681, 602 P.2d 1326 (1979).

Liability for double the value of the property converted is imposed by K.S.A. 59-1704 when any person converts the property of a decedent or conservatee. *Bolton v. Souter*, 19 Kan. App. 2d 384, 872 P.2d 758 (1993).

H. TORTIOUS INTERFERENCE WITH CONTRACTS

124.91

TORTIOUS INTERFERENCE—EXISTING CONTRACTUAL RELATIONS

The plaintiff may recover damages from the defendant for tortious interference with an existing contract if plaintiff proves:

- 1. the existence of a contract;**
- 2. the defendant’s knowledge thereof;**
- 3. the defendant’s intentional bringing about of its breach;**
- 4. the absence of justification; and**
- 5. damages resulting therefrom.**

Additionally, the plaintiff must prove malicious conduct by the defendant.

Notes on Use

For authority, see Restatement (Second) of Torts § 766 (1977) and Prosser and Keeton on the Law of Torts (5th ed.) § 129; *Turner v. Halliburton Co.*, 240 Kan. 1, 722 P.2d 1106 (1986); and *Dickens v. Snodgrass, Dunlap & Co.*, 255 Kan. 164, 872 P.2d 252 (1994).

The definition of legal malice should be given with this instruction. As stated in *Turner*, “Both tortious interference with a contract and tortious interference with contractual expectations or a prospective business advantage are predicated on malicious conduct by the defendant.” 240 Kan. at 12. The definition of legal malice is set forth in PIK 4th 103.05: “Malice is the intent to do harm without any reasonable justification or excuse.”

The Committee recognizes that the Supreme Court in *Turner* held that the plaintiff, who was alleging tortious interference with contract, must prove actual malice. The court defined actual malice as “evil-mindedness or specific intent to injure.” 240 Kan. at 8. “Where the allegation of tortious interference with contract, or the prospect of a contract, is based upon alleged defamatory statements from the former employers to the prospective employer, we hold that such communication is subject to a qualified privilege which requires the plaintiff to prove actual malice by the defendant in making such communication.” 240 Kan. at 14. Based on the language in the *Turner* opinion, the Committee believes that legal malice, and not actual malice, is still the required element for claims of tortious interference that do not involve defamation, a qualified privilege or other claims or defenses having constitutional underpinnings.

Where the alleged interference is based on defamatory statements made by the defendant, see PIK 4th 127.51 *et seq.* for applicable instructions on the tort of defamation. Where a qualified or conditional privilege is asserted as a defense to a claim based on defamatory statements, PIK 4th 127.53, Qualified or Conditional Privilege, should be given.

Comment

In *Hawkinson v. Bennett*, 265 Kan. 564, 599, 962 P.2d 445 (1998), the district court instructed the jury that the defendants must have induced the breach of the contract with actual malice in order for plaintiffs to recover for tortious interference with a contract. The jury was instructed that “ ‘actual malice’ means actual evil-mindedness or special intent to injure.” 265 Kan. at 600. Neither party challenged these instructions on appeal, and the Supreme Court did not comment on the propriety of requiring actual malice.

In *DP-Tek, Inc. v. AT & T Global Information Co.*, 891 F. Supp. 1510 (D. Kan. 1995), the federal district court noted that, “This court does not believe that the *Turner* case supports an interpretation that actual malice is required for a finding of wrongful conduct sufficient to support a tortious interference claim. While the *Turner* case does discuss an actual malice standard, that is only because the plaintiff’s tortious interference claim was based upon alleged defamatory statements made by the defendant former employer. This court does not interpret *Turner* to require a showing of actual malice to support a tortious interference claim when the claim is not based upon defamation. Other Kansas authorities, and the Restatement, make no mention of an actual malice requirement.”

A claim for tortious interference with a contractual relationship requires the existence of a valid and enforceable contract at the time of the interference between the plaintiff and a third party. *Macke Laundry Service Ltd. Partnership v. Mission Assocs., Ltd.*, 19 Kan. App. 2d 553, 873 P.2d 219 (1994).

Corporate officers and employees acting within the scope of their employment (and not as individuals) cannot be held liable for tortious interference with a contract—if anything they may be liable for a breach of contract. *Clevenger v. Catholic Social Service of the Archdiocese of Kansas City*, 21 Kan. App. 2d 521, 901 P.2d 529 (1995) (citing *May v. Santa Fe Trail Transportation Co.*, 189 Kan. 419, 370 P.2d 390 (1962)). See also *Stanfield v. Osborne Industries, Inc.*, 7 Kan. App. 2d 416, 643 P.2d 1115, *aff’d in part, rev’d in part* 232 Kan. 197, 654 P.2d 917 (1982).

124.92

**TORTIOUS INTERFERENCE—PROSPECTIVE BUSINESS
ADVANTAGE OR RELATIONSHIP**

The plaintiff may recover damages from the defendant for tortious interference with a prospective business advantage or relationship if plaintiff proves:

- 1. the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff;**
- 2. knowledge of the relationship or expectancy by the defendant;**
- 3. that, except for the conduct of the defendant, the plaintiff was reasonably certain to have continued the relationship or realized the expectancy;**
- 4. intentional misconduct by the defendant; and**
- 5. damages suffered by the plaintiff as a result of defendant's misconduct.**

Additionally, the plaintiff must prove malicious conduct by the defendant.

Notes on Use

For authority, see Restatement (Second) of Torts § 766 (1977) and Prosser and Keeton on the Law of Torts (5th ed.) § 129; *Turner v. Halliburton Co.*, 240 Kan. 1, 722 P.2d 1106 (1986).

The definition of legal malice should be given with this instruction. As stated in *Turner*, “Both tortious interference with a contract and tortious interference with contractual expectations or a prospective business advantage are predicated on malicious conduct by the defendant.” 240 Kan. at 12. The definition of legal malice is set forth in PIK 4th 103.05: “Malice is the intent to do harm without any reasonable justification or excuse.”

The Committee recognizes that the Supreme Court in *Turner* held that the plaintiff, who was alleging tortious interference with contract, must prove actual malice. The court defined actual malice as “evil-mindedness or specific intent to injure.” 240 Kan. at 8. “Where the allegation of tortious interference with contract, or the prospect of a contract, is based upon alleged defamatory statements from the former employers to the prospective employer, we hold that such communication is subject to a qualified privilege which requires the plaintiff to prove actual malice by the defendant in making such communication.” 240 Kan. at 14. Based on the language in the *Turner* opinion, the Committee believes that legal malice, and not actual malice, is still the required element for claims of tortious interference that do not involve defamation, a qualified privilege or other claims or defenses having constitutional underpinnings.

Where the alleged interference is based on defamatory statements made by the defendant, see PIK 4th 127.51 *et seq.* for applicable instructions on the tort of defamation. Where a qualified or conditional privilege is asserted as a defense to a claim based on defamatory statements, PIK 4th 127.53, Qualified or Conditional Privilege, should be given.

Comment

The elements of this tort were first set out in Kansas in *Professional Investors Life Ins. Co. v. Roussel*, 528 F. Supp. 391 (D. Kan. 1981), and *Maxwell v. Southwest National Bank*, 593 F. Supp. 250 (D. Kan. 1984), and adopted by the Kansas Supreme Court in *Turner v. Halliburton Co.*, 240 Kan. 1, 722 P.2d 1106 (1986). Although the Kansas cases, including *Turner*, never include malice in enumerating the elements of this tort, the Kansas Supreme Court has made it clear that an action for tortious interference with a contract is always predicated on malicious conduct by the defendant. *Dickens v. Snodgrass, Dunlap & Co.*, 255 Kan. 164, 169, 872 P.2d 252 (1994), and *Hawkinson v. Bennet*, 265 Kan. 564, 599, 962 P.2d 445 (1998). See also *Reebles, Inc. v. Bank of America N.A.*, 29 Kan. App. 2d 205, 25 P.3d 871 (2001), and *L & M Enterprises, Inc. v. BEI Sensors & Systems Co.*, 231 F.3d 1284 (2000). In *DP-Tek, Inc. v. AT & T Global Information Co.*, 891 F. Supp. 1510 (D. Kan. 1995), the federal district court noted that, “[t]his court does not believe that the *Turner* case supports an interpretation that actual malice is required for a finding of wrongful conduct sufficient to support a tortious interference claim. While the *Turner* case does discuss an actual malice standard, that is only because the plaintiff’s tortious interference claim was based upon alleged defamatory statements made by the defendant former employer. This court does not interpret *Turner* to require a showing of actual malice to support a tortious interference claim when the claim is not based upon defamation. Other Kansas authorities, and the Restatement, make no mention of an actual malice requirement.”

Not all interference in present or future contractual relations is tortious. A person may be privileged or justified to interfere with the contractual relations in certain situations. See *May v. Santa Fe Trail Transportation Co.*, 189 Kan. 419, 370 P.2d 390 (1962). See Also Restatement (Second) of Torts § 767 (1977).

124.93

TORTIOUS INTERFERENCE—JUSTIFICATION

It is a defense to an action for tortious interference with existing or prospective contractual relations that the interference was justified. Justification exists when the defendant acts in the exercise of a right equal to or superior to that of the plaintiff and used fair means and good faith for some lawful interest or purpose.

In determining whether the interference was justified, the following factors should be considered:

- 1. the nature of the defendant's conduct;**
- 2. the defendant's motive;**
- 3. the interests of the plaintiff with which the defendant's conduct interfered;**
- 4. the interests sought to be advanced by the defendant;**
- 5. the social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff;**
- 6. the proximity or remoteness of the defendant's conduct to the interference; and**
- 7. the relations between the parties.**

Notes on Use

Authority for this instruction is found in *Turner v. Halliburton Co.*, 240 Kan. 1, 722 P.2d 1106 (1986). See also Restatement (Second) of Torts § 767.

Where qualified or conditional privilege is asserted as a defense to a claim based on defamatory statements, PIK 4th 127.53 should be given.

Comment

In *Turner v. Halliburton Co.*, 240 Kan. 1, 722 P.2d 1106 (1986), the court stated that a person may be privileged or justified to interfere with contractual relations in certain situations. The court cited the Restatement (Second) of Torts § 767, which uses the factors enumerated in the above instruction to determine whether the alleged interference was “improper.” The court also cited Prosser and Keeton on the Law of Torts (5th ed.) § 129 for the proposition that, “Occasions privileged under the law of defamation are also occasions in which interference with contractual relations may be considered justified or privileged.”

The Restatement (Second) of Torts §§ 768-773 address whether the alleged interference is “improper” in certain, special situations and in such situations the specific provisions of §§ 768-773 apply rather than the general factors listed in § 767. In *DP-Tek, Inc. v. AT & T Global Information Co.*, 891 F. Supp. 1510 (D. Kan. 1995), the federal district court noted that Kansas courts have adopted other portions of the Restatement in regards to the torts of tortious interference and concluded the Kansas Supreme Court would, in the proper factual circumstances, adopt the business competitor privilege set forth in § 768 of the Restatement.

A defense of justification to a tortious interference claim must be affirmatively pled. *Burrowwood Assocs., Inc. v. Safelite Glass Corp.*, 18 Kan. App. 2d 396, 853 P.2d 1175 (1993).

See K.S.A. 44-119a, which grants an employer qualified or absolute immunity in connection with disclosures of certain information about a current or former employee to a prospective employer of such employee.

Reebles, Inc. v. Bank of America, N.A., 29 Kan. App. 2d 205, 211, 25 P.3d 871 (2001), cited PIK 3d 124.93 [now PIK 4th 124.93] as an additional illustration of what circumstances may justify an interference with contract under Kansas law.

125.01

**CONFIDENTIAL OR FIDUCIARY RELATIONSHIP—SUBMITTED
AS A QUESTION OF LAW OR FACT**

[The Court has found, as a matter of law] [The Plaintiff contends] that a confidential or fiduciary relationship existed between _____, the Plaintiff, and _____, the Defendant.

A confidential or fiduciary relationship is any relationship of blood, business, friendship or association in which one of the parties places special trust and confidence in the other.

A confidential or fiduciary relationship exists in a case in which there has been a special confidence placed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one placing the confidence.

Notes on Use

The Committee recommends this instruction for the purpose of explaining to the jury the nature of a fiduciary relationship, whether the relationship has been established as a matter of law or whether a factual issue is presented for the jury's determination. This instruction has been drawn to cover either situation.

Comment

A fiduciary relationship does not depend upon some technical relationship created by, or defined in, law. It may exist under a variety of circumstances, and does exist in cases where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence. *Ford v. Guarantee Abstract & Title Co.*, 220 Kan. 244, 553 P.2d 254 (1976), *later proceeding* 228 Kan. 532, 618 P.2d 1195 (1980), *overruled on other grounds* 232 Kan. 76, 652 P.2d 665 (1982).

Whether or not a confidential or fiduciary relationship exists depends on the facts and circumstances of each individual case. Kansas appellate courts have declined for that reason to give an exact definition of confidential or fiduciary relationships. *Moore v. Moore*, 56 Kan. App. 2d 301, Syl. ¶ 4, 429 P. 3d 607 (2018), *rev. denied* 309 Kan. 1348 (2019). Courts of equity have refrained from defining the particular instances of fiduciary relationships in such a manner that other and perhaps new cases might be excluded, and have refused to set any bounds to the circumstances out of which a fiduciary relationship may spring. It extends to every possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side and resulting domination and influence on the other. *Denison State Bank v. Madeira*, 230 Kan. 684, 230 Kan. 815, 640 P.2d 1235 (1982). See also *Brown v. Foulks*, 232 Kan. 424, 657 P.2d 501 (1983).

Kansas appellate courts have used the terms “fiduciary” and “confidential” relationships interchangeably. For example, in its discussion of the parties’ relationship in *Moore v. Moore*, *supra*, the Court of Appeals cited both *Brown v. Foulks*, 232 Kan. 424, 430-31, 657 P.2d 501 (1983), and *Nelson v. Nelson*, 38 Kan. App. 2d 64, 78 (2007), *aff’d* 288 Kan. 570, 205 P.3d 715 (2009). In *Brown*, the Supreme Court held that the term “fiduciary relation” refers to “any relationship of blood, business, friendship, or

association in which one of the parties reposes special trust and confidence in the other who is in a position to have and exercise influence over the first party.” In *Nelson*, the Court of Appeals used identical language to define a “confidential relationship.”

The concept of the fiduciary duty is an equitable one and while no precise definition may be given, there are certain broad principles which should be considered in making a determination of whether a fiduciary relationship exists in any particular factual situation. *Denison State Bank v. Madeira*, 230 Kan. 684, 230 Kan. 815, Syl. ¶ 3, 640 P.2d 1235 (1982).

It may be said that generally there are two types of fiduciary relationships: (1) those specifically created by contract such as principal and agent, attorney and client, and trustee and cestui que trust, for example, and those created by formal legal proceedings such as guardian and/or conservator and ward, and executor or administrator of an estate, among others, and (2) those implied in law due to the factual situation surrounding the involved transactions and the relationship of the parties to each other and to the questioned transactions. The determination of the existence of a fiduciary relationship of the first category, though not without problems on occasion, is usually relatively simple. The second category becomes more difficult to determine and must depend upon the facts in each case. *Denison State Bank v. Madeira*, 230 Kan. 684, 691, 640 P.2d 1235 (1982).

The Kansas reports contain many cases where a fiduciary relationship has been found to exist between the parties. A fiduciary relationship may exist between partners in an oil and gas lease, *More v. Burroughs*, 111 Kan. 28, 205 P. 1029 (1922), or between the widow of a deceased partner and the surviving partner in a lease, *Miller v. Henderson*, 140 Kan. 46, 33 P.2d 1098 (1934). Such a relationship may exist between joint adventurers in a business enterprise, *Paul v. Smith*, 191 Kan. 163, 380 P.2d 421 (1963). It has been held that a life tenant, with power to sell real property devised to her for life with remainder to designated persons, is a quasi trustee and occupies a fiduciary relationship to the remaindermen and, in the exercise of that power, she owes to them the highest duty to act honestly and in good faith by selling property to a bona fide purchaser for the best price offered. *Windscheffel v. Wright*, 187 Kan. 678, 360 P.2d 178 (1961). See also *In re Estate of Miller*, 225 Kan. 655, 594 P.2d 167 (1979). The officers and directors of a corporation occupy a strict fiduciary relationship with respect to both the corporation and its shareholders. *Newton v. Hornblower Inc.*, 224 Kan. 506, 582 P.2d 1136 (1978); *Sampson v. Hunt*, 222 Kan. 268, 564 P.2d 489 (1977). For discussion of the fiduciary duty of a corporate director in the context of a merger, see *In re Hesston Corp.*, 254 Kan. 941, 870 P.2d 17 (1994).

Where a law firm handles the sale of the working interests in oil and gas leases of all the owners (including an opposing party in a prior, related lawsuit) and agrees to assume responsibility for collecting revenue, deducting expenses, and paying to each owner that to which the owner is entitled, an agency relationship exists and along with it, a fiduciary relationship. *Gillespie v. Martin, Pringle, Oliver, Wallace & Swartz*, 258 Kan. 91, 899 P.2d 478 (1995).

Several of our cases recognize that a fiduciary relationship may exist between members of the same family where land is deeded by one to the other and a confidence is in some way violated. *Staab v. Staab*, 160 Kan. 417, 163 P.2d 418 (1945); *Overstreet v. Beadles*, 151 Kan. 842, 101 P.2d 874 (1940); *Silvers v. Howard*, 106 Kan. 762, 190 P. 1 (1920).

Fiduciary relationships may also arise from contractual relationships involving joint business enterprises, where one party has superior knowledge and the other party justifiably relies on him. *Wolf v. Brungardt*, 215 Kan. 272, 524 P.2d 726 (1974). See also *First Bank of Wakeeney v. Moden*, 235 Kan. 260, 681 P.2d 11 (1984).

For a discussion of the rules applicable to determine the existence of a fiduciary relationship, see *Olson v. Harshman*, 233 Kan. 1055, 1057-59, 668 P.2d 147 (1983).

125.02

FIDUCIARY DUTY

A fiduciary has the duty to act with good faith and loyalty to advance the interests of the person placing confidence in *(him) (her)*. In this case the Plaintiff claims this duty was breached by the Defendant in the following manner _____.

Notes on Use

This instruction should be used in cases involving a breach of fiduciary duty. The acts or omissions to constitute the breach should be listed.

Comment

See Comments in PIK 4th 125.01, Confidential or Fiduciary Relationship—Submitted as a Question of Law or Fact.

See *George v. Bolen-Williams, Realtors*, 2 Kan. App. 2d 385, 387-88, 580 P.2d 1357 (1978); and *Stevens v. Jayhawk Realty Co.*, 9 Kan. App. 2d 338, 342, 677 P.2d 1019, aff'd 236 Kan. 90, 689 P.2d 786 (1984).

125.03

DISCHARGE OF FIDUCIARY RESPONSIBILITY

A fiduciary is not responsible to another party for acts or omissions occurring after the other party voluntarily and intentionally relieves the fiduciary of the obligation to perform. This can occur when the other party expressly discharges the fiduciary or acts in a manner inconsistent with the right to the fiduciary's performance.

Notes on Use

This instruction should be given when there is an issue as to whether or not the defendant has been relieved of fiduciary responsibility.

126.01

DEFINITIONS

Comment

This instruction has been deleted. Under Kansas law, there is no longer a reason to define “business visitor,” “public invitee,” or “licensee.” See PIK 4th 126.21, Duty To Trespasser, for a definition of “trespasser.” See also the Comment to PIK 4th 126.02, Duty To Others.

126.02

DUTY TO OTHERS

An occupier of land owes a duty to others of reasonable care under all the circumstances.

In order to determine whether the occupier of land exercised reasonable care in maintaining the land you shall consider the following factors:

- 1. The foreseeability of harm to the plaintiff;**
- 2. The magnitude of the risks of injury to others by maintaining the land in such a condition;**
- 3. The individual and social benefit of maintaining the land in such a condition;**
- 4. The cost and inconvenience of providing adequate protection whether incurred by the occupier of the land and/or the community.**
- [5. Other factors appropriate to the case.]**

Notes on Use

This instruction should be given when the plaintiff is not a trespasser, as defined in PIK 4th 126.21, Duty To Trespasser.

Comment

In *Jones v. Hansen*, 254 Kan. 499, 867 P.2d 303 (1994), the court abolished the common-law distinctions between the duties owed to invitees and licensees, while retaining the common-law rules regarding trespassers. For this reason, the Committee has eliminated prior references to invitees and licensees. The *Jones v. Hansen* totality of the circumstances rule was applied in *Brock v. Richmond-Berea Cemetery Dist.*, 264 Kan. 613, 957 P.2d 505 (1998). See also *Seitz v. Lawrence Bank*, 36 Kan. App. 2d 283, 138 P.3d 388 (2006).

The duty owed to others does not include a duty to remove or to warn of known and obvious dangers, subject to a very limited obligation to minimize the risk when there is reason to expect a person on the premises may be distracted from those dangers. See *Miller v. Zep Mfg. Co.*, 249 Kan. 34, 815 P.2d 506 (1991), *DiPietro v. Cessna Aircraft Co.*, 28 Kan. App. 2d 372, 16 P.3d 986 (2000), and *Wellhausen v. University of Kansas*, 40 Kan. App. 2d 102, 189 P.3d 1181 (2008).

For a review of the law of premises liability see Giffin and Stayton, *Landowners Beware: The Current Status of Premises Liability in Kansas*, 64 J.B.A.K. 18 (1995).

In a slip and fall action, the court used the “slight defect rule,” holding that a slight irregularity in a sidewalk is not sufficient to establish actionable negligence in the construction and maintenance of the sidewalk. The court then held that the “slight defect rule” is not applied in cases where the irregularity in a sidewalk is created by the negligent acts of the party against whom recovery is sought. See *Lyon v. Hardee’s Food Systems, Inc.*, 250 Kan. 43, 53, 824 P.2d 198 (1992).

126.03

DUTY TO WARN

An owner or operator of a place open to the public must warn of any dangerous condition that is either known or in the exercise of reasonable care should be known.

The duty to warn the public is limited to that part of the premises designed, adapted, and prepared for the accommodation of the public, or to which the public may reasonably be expected to go.

Comment

For authority, see *Thompson v. Beard & Gabelman, Inc.*, 169 Kan. 75, 77, 216 P.2d 798 (1950) (the plaintiff, a customer in a dress shop, fell down a flight of stairs to the basement. The duty owed to a business visitor is limited to that part of the premises designed, adapted and prepared for the accommodation of customers, or to which customers may reasonably be expected to go.)

A business visitor following a course of his own choosing, unfamiliar to him, so dark he could not see, is denied recovery. *Kurre v. Graham Ship by Truck Co.*, 136 Kan. 356, 15 P.2d 463 (1932).

A business proprietor has no duty to warn and shelter patrons from severe weather they may encounter on their journey home from the proprietor's business. *Cunningham v. Braum's Ice Cream and Dairy Stores*, 276 Kan. 883, Syl. ¶ 4, 5, 80 P.3d 35 (2003).

A landowner owes employees of an independent contractor working on the landowner's premises a duty to warn of any dangerous conditions. The landowner is not protected by the exclusive remedy provisions of the Workers Compensation Act. *Herrell v. National Beef Packing Co.*, 292 Kan. 730, 259 P.3d 663 (2011).

126.04

KNOWLEDGE OF DANGEROUS CONDITION

You may find an (owner) (operator) (occupier) of premises liable for an injury that resulted from a dangerous condition only if you find that the (owner) (operator) (occupier) had actual knowledge of the condition, or the condition had existed for such a length of time that in the exercise of reasonable care the (owner) (operator) (occupier) should have known of it.

[When a dangerous condition is created or maintained by the (owner) (operator) (occupier), or by one for whose acts the (owner) (operator) (occupier) is responsible, knowledge of the condition is implied.]

Notes on Use

This instruction should be given in cases in which notice of an alleged dangerous condition is an issue. The bracketed sentence should be included when there is evidence that the condition was created or maintained by the proprietor or his employee.

Comment

With respect to the necessity of proof that the proprietor of a place of business had notice of a dangerous condition alleged to have caused injury to an invitee, the cases are divided into two classes: (1) those in which injuries to business visitors were caused by dangerous conditions negligently created or maintained by the proprietor or his employees; and (2) those in which injuries were due to dangerous conditions that came about through no active fault of the proprietor and that did not involve an instrumentality employed by him in the conduct of his business. In the former, proof of notice is unnecessary. In the latter, it must be shown that the proprietor had actual knowledge, or that the condition had existed for such a length of time that in the exercise of ordinary care he should have known of it. PIK 4th 126.04 may be modified to fit either or both situations. For authority, see *Magness v. Sidmans Restaurants, Inc.*, 195 Kan. 30, 402 P.2d 767 (1965); *Little v. Butner*, 186 Kan. 75, 348 P.2d 1022 (1960); and Comment to PIK 4th 126.02, Duty to Others.

The rule about constructive knowledge was stated and applied in *Bingham v. Hillcrest Bowl, Inc.*, 199 Kan. 40, 427 P.2d 591 (1967), where the plaintiff had slipped and fallen on a wet terrazzo floor inside an entrance to a building.

In a case involving a piece of lettuce on a floor, it was determined that neither actual nor constructive notice was shown by the evidence. *Smith v. Mr. D's, Inc.*, 197 Kan. 83, 415 P.2d 251 (1966).

“A business proprietor, absent unusual circumstances, may await the end of a winter storm and a reasonable time thereafter to remove ice and snow from outdoor entrance walks, platforms, or steps because it is impractical to take action earlier.” *Agnew v. Dillons, Inc.*, 16 Kan. App. 2d 298, Syl. ¶ 2, 822 P.2d 1049 (1991). Failure to give an “Agnew instruction” was ruled not to be error in *Worley v. Bradford Pointe Apartments, Inc.*, 31 Kan. App. 2d 737, 73 P.3d 149 (2003). In *Jones v. Hansen*, 254 Kan. 499, 510-11, 867 P.2d 303 (1994), the Kansas Supreme Court adopted the *Agnew* rationale, “adopting a standard of reasonable care under all the circumstances for licensees and invitees in premises liability cases.”

126.05

MODE OF OPERATION RULE

An (*owner*) (*operator*) (*occupier of premises*) of a business is liable for a slip and fall injury that results from a dangerous condition if:

- 1. the business had adopted a mode of operation in which the dangerous condition could regularly occur; and**
- 2. the (*owner*) (*operator*) (*occupier of premises*) failed to use reasonable measures, considering the risk involved, to discover the dangerous condition and remove it.**

Notes on Use

This instruction should only be used when the business has adopted a “mode of operation” such as one used in self-service food markets where the proprietor could reasonably anticipate that hazardous conditions would regularly arise.

Comment

Kansas courts have adopted the “mode-of-operation rule” which generally allows a plaintiff in a slip-and-fall case to recover without a proprietor’s actual or constructive knowledge of a dangerous condition if the plaintiff shows the proprietor adopted a mode of operation where a patron’s carelessness should be anticipated and the proprietor fails to use reasonable measures commensurate with the risk involved to discover the condition and remove it. *Jackson v. K-Mart Corp.*, 251 Kan. 700, 710, 840 P.2d 463 (1992).

The mode-of-operation instruction is properly given only in cases where the evidence establishes that a company’s adoption of a particular mode of operation makes it reasonably foreseeable that a dangerous condition could regularly occur. *Hembree v. Wal-Mart of Kansas*, 29 Kan. App. 2d 900, Syl. ¶ 2, 35 P.3d 925 (2001).

126.21

DUTY TO TRESPASSER

A trespasser is a person who enters or remains on premises in the possession of another without the possessor's express or implied consent, any right, or lawful authority. The duty owed by an owner or occupier of premises to a trespasser is to refrain from willfully, wantonly, or recklessly injuring the trespasser.

Notes on Use

This instruction should be given with the appropriate definition from PIK 4th 103.03, Wanton Conduct Defined, PIK 4th 103.04, Willful Conduct Defined, and the applicable part of PIK 4th 127.73, defining Reckless Conduct.

In certain situations, consent to enter another's property may be implied by the circumstances, with a corresponding duty of reasonable care owed by the possessor of the property. In those circumstances, this instruction should be given with PIK 4th 126.22, Private Necessity—Entering or Remaining on Property to Prevent Serious Harm. See *Wrinkle v. Norman*, 297 Kan. 420, 301 P.3d 312 (2013).

Comment

For authority, see *Montague v. Burgerhoff*, 150 Kan. 217, 223, 92 P.2d 98 (1939), *Riddle Quarries, Inc. v. Thompson*, 177 Kan. 307, 311, 279 P.2d 266 (1955) and *Jones v. Hansen*, 254 Kan. 499, 509, 867 P.2d 303 (1994).

For authority for the definition of trespasser, see *Riddle Quarries, Inc. v. Thompson*, 177 Kan. 307, 311, 279 P.2d 266 (1955), citing Restatement, Torts § 329 (1934). See Restatement, Torts 2d § 329 (1965), which provides:

“A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise.”

See also *Gerchberg v. Loney*, 223 Kan. 446, 576 P.2d 593 (1978).

While the duty owed to licensees and invitees was changed in *Jones v. Hansen*, 254 Kan. 499, 509, 867 P.2d 303 (1994), the duty owed to trespassers remains unaffected. See also *Seitz v. Lawrence Bank*, 36 Kan. App. 2d 283, 138 P.3d 388 (2006). But see *Wrinkle v. Norman*, 297 Kan. 420, 301 P.3d 312 (2013), where duty to trespassers is reaffirmed, subject to modification in certain circumstances of private necessity or public purpose. See also K.S.A. 58-821, effective July 1, 2014.

A strong argument can be made that the duty owed a discovered trespasser is reasonable care under the circumstances. See 49 A.L.R. 778; 156 A.L.R. 1226; Prosser and Keeton on the Law of Torts (2d ed.) p. 436 § 76; Peaslee, *Duty to Seen Trespassers*, 27 Harvard L. Rev. 403 (1914).

In *Frazer v. St. Louis-San Francisco Rly. Co.*, 219 Kan. 661, 549 P.2d 561 (1976), the court affirmed the principle of law consistent with this instruction, indicating that “the only duty owed by landowner to a trespasser is to refrain from willfully, wantonly or recklessly injuring him.”

126.22

**PRIVATE NECESSITY—ENTERING OR REMAINING
ON PROPERTY TO PREVENT SERIOUS HARM**

A person has implied consent to *(enter) (remain)* on premises in the possession of another and is not a trespasser if being on the premises is necessary, or reasonably appears to be necessary, to prevent serious harm to *(the person entering the premises) (property of the person entering the premises) (the person in possession of the premises) (property of the person in possession of the premises) (another person) (property of another person)*.

In that case, the possessor of the premises owes a duty of reasonable care to the person *(entering) (remaining)* on the premises.

[If the person who *(entered) (remained)* on the property *(knew) (had reason to know)* that the one for whose benefit the person *(entered) (remained)* on the property was unwilling for the person to take that action, that person did not have implied consent to *(enter) (remain)* to prevent serious harm.]

Notes on Use

This instruction should be given only when a claim of trespassing is made and a defense is asserted based on implied consent to prevent serious harm. This instruction should then be given with PIK 4th 126.21, Duty to Trespasser.

The bracketed paragraph should be used when the claims addressed in that paragraph are made by one of the parties. The jury then must decide whether the claimed knowledge existed, negating implied consent to be on the property.

Comment

In *Wrinkle v. Norman*, 297 Kan. 420, 301 P.3d 312 (2013), the court adopted Restatement (Second) of Torts §§ 197 and 345, with some modifications to comport with Kansas comparative negligence and premises liability law. Together the sections “create a presumption of implicit permission for one party to enter the property of another in order to prevent certain kinds of serious harm, and the possessor of the property has a duty of reasonable care to protect the wellbeing of the person exercising that privilege.” 297 Kan. at 424.

126.30

LANDLORD'S DUTY AS TO LEASED PREMISES

A landlord has a duty to disclose an unsafe condition if:

- 1. at the time a tenant takes possession of leased premises the landlord knows, or by the exercise of reasonable care should know, of some unsafe condition in or on the premises;**
- 2. the unsafe condition is not known by *(the tenant) (a member of the tenant's family) (a person present with the tenant's consent)*; and**
- 3. the unsafe condition is not of a type that would be discovered in the exercise of reasonable care.**

Comment

In certain circumstances, a landlord may, by an exculpatory clause in a lease, exempt himself from negligence. *Talley v. Skelly Oil Co.*, 199 Kan. 767, 433 P.2d 425 (1967).

But see *Borders v. Roseberry*, 216 Kan. 486, 532 P.2d 1366 (1975), setting out the general principles of law to be followed in the determination of liability of a landlord to a social guest of the tenant of leased premises.

The rule was followed and judgment for defendant at close of plaintiff's evidence upheld, under circumstances where a tenant died resulting from burns received when her clothing was ignited by an open-faced gas heater. *Tillotson v. Abbott*, 205 Kan. 706, 472 P.2d 240 (1970).

An earlier version of this instruction is referred to and is recognized as in accordance with the law in *Bodnar v. Jackson*, 205 Kan. 469, 470 P.2d 726 (1970), a case involving a claimed defective basement stairway and banister.

In *Jackson v. Wood*, 11 Kan. App. 2d 478, 726 P.2d 796, *rev. denied* 240 Kan. 804 (1986), the court held that a landlord's duty of care owed to a social guest of his tenant is controlled, not by licensee-invitee distinction, but by the common-law rule that landlord owes no duty to the guest except in certain specific situations. One of those situations is where the landlord has contracted to keep the premises in repair. The court then found that the Kansas Residential Landlord and Tenant Act in K.S.A. 58-2553(a)(3) imposes a contract and duty of reasonable care on landlords subject to this Act.

See also *Burch v. University of Kansas*, 243 Kan. 238, 756 P.2d 431 (1988), where the court held that the duty of the owner to exercise reasonable care in keeping a common area in a reasonably safe condition extends to persons expressly or impliedly invited by a tenant, including social guests of a tenant.

In *Colombel v. Milan*, 24 Kan. App. 2d 728, 952 P.2d 941 (1998), the Court of Appeals upheld the trial court's dismissal of a lawsuit filed by a social guest of a tenant, against a landlord, when he had been bitten by a tenant's dog. The landlord, who was not a possessor, harborer, owner or keeper of the tenant's dog was not liable for the third party's injuries.

The corporate owner of the real property that housed the local chapter of a fraternity at the University of Kansas was not liable for personal injuries sustained by a minor as a result of excessive consumption of alcoholic beverages. *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 273 Kan. 828, 47 P.3d 402 (2002).

126.31

LANDLORD’S DUTY AS TO RESERVED PARTS

A landlord who leases parts of premises to different tenants and expressly or impliedly reserves other parts thereof, such as (*entrances*) (*halls*) (*stairways*) (*porches*) (*walks*), for the common use of different tenants, has a duty to exercise reasonable care to keep those reserved parts in a safe condition for use in the manner and for the purpose intended.

Notes on Use

This instruction should be given only in instances where areas are reserved for use by more than one tenant. PIK 4th 126.33 should be given with this instruction.

Comment

There is a difference in the duty owed by a landlord concerning premises leased to others and concerning premises reserved and under the landlord’s control. The landlord’s duty as to care does not extend to his tenants or their invitees with respect to areas other than those included in their leases or used in common by the tenants, or to nonintended uses of an area. A tenant may become a licensee or trespasser. For authority and collection of cases, see *Trimble v. Spears*, 182 Kan. 406, 320 P.2d 1029 (1958).

A landlord is liable for injuries to a tenant or his invitee resulting from a defect in a reserved area when he knows of the defect, or by the exercise of ordinary care he should have known of it, and had an opportunity to repair it.

In *Ramirez v. Trail Ridge Apartments, Inc.*, 211 Kan. 112, 505 P.2d 757 (1973), the court cited this instruction as being the correct statement of the law to reserved areas of the premises.

In *Burch v. University of Kansas*, 243 Kan. 238, 756 P.2d 431 (1988), the trial court concluded that a housing contract between the University of Kansas and a student was technically not a lease in the traditional sense. Consequently, a plaintiff grandmother, as an implied invitee and guest of her granddaughter, was not protected under the common area exception.

The Supreme Court reversed, adopting the liberal approach taken by it in *Albanese v. Edwardsville Mobile Home Village, Inc.*, 215 Kan. 826, 529 P.2d 163 (1974), in applying the common area exception under Restatement (Second) of Torts §§ 360, 361. The court stated that “the term ‘lessor of land’ is to be construed to include any contractual relationship, written or oral, where the owner of property leases land and retains under his possession and control certain areas of the land which various renters or tenants are entitled to use as appurtenant to the part leased to them.” *Burch v. University of Kansas*, 243 Kan. 238, 247, 756 P.2d 431 (1988).

“A business proprietor, absent unusual circumstances, may await the end of a winter storm and a reasonable time thereafter to remove ice and snow from outdoor entrance walks, platforms, or steps because it is impractical to take action earlier.” *Agnew v. Dillons, Inc.*, 16 Kan. App. 2d 298, Syl. ¶ 2, 822 P.2d 1049 (1991). Failure to give an “Agnew instruction” was ruled not to be error in *Worley v. Bradford Pointe Apartments, Inc.*, 31 Kan. App. 2d 737, 73 P.3d 149 (2003). In *Jones v. Hansen*, 254 Kan. 499, 510-11, 867 P.2d 303 (1994), the Kansas Supreme Court adopted the *Agnew* rationale, “adopting a standard of reasonable care under all the circumstances for licensees and invitees in premises liability cases.”

126.32

LANDLORD'S PROMISE TO REPAIR

A landlord is liable for injuries caused to the landlord's tenant (*and others on the land with the consent of the tenant*) (*and the tenant's subtenant*) by a condition of disrepair when:

- 1. the landlord, as such, has (*contracted*) (*promised*) in the lease or otherwise to keep the premises in repair, and**
- 2. the disrepair creates an unreasonable risk to persons on the premises which the performance of the landlord's promise would have prevented, and**
- 3. the landlord fails to exercise reasonable care to perform that (*contract*) (*promise*).**

Notes on Use

If the landlord raises no issue of consideration for a promise to repair, the word "promised" in subparagraph 1 should be used instead of the word "contracted." If the landlord raises the issue of consideration, then the word "contracted" should be used and instructions should be given in accordance with PIK 4th 124.01, Definition of Contract; PIK 4th 124.03, Formation of Contracts; PIK 4th 124.12, Consideration; and, when appropriate, PIK 4th 124.13, Promissory Estoppel.

Comment

For authority, see *Williams v. Davis*, 188 Kan. 385, 362 P.2d 641 (1961), citing Restatement, Torts § 357 (1934), holding that an action exists for injuries to a seven-year-old boy who slipped and rolled through the banister of a porch of an apartment rented by his parents on the landlord's assurance to repair the porch so it would not be dangerous to children. Also see *Transport Insurance Co. v. Huston*, 207 Kan. 759, 486 P.2d 1344 (1971), involving personal injuries resulting from the fall of a bumper used to absorb the shock of trucks hitting a dock at a door where the bumper had been located. In the latter case, the Supreme Court of Kansas stated that it adhered to the basic concept contained in Restatement (Second) of Torts § 357 (1965), which is the basis of the recommended instruction.

Concerning a lessor's duty to repair, see *Vieyra v. Engineering Investment Co., Inc.*, 205 Kan. 775, 473 P.2d 44 (1970), which involved personal injuries sustained when a freight elevator broke and fell to the bottom of the shaft. In *Vieyra*, the Supreme Court of Kansas noted that when a lessor's duty rests upon a general contract to repair contained in a lease and no right of access or control is reserved, the lease defines the extent of the lessor's duty. It further stated that unless the lease provides for inspection by the lessor, "the covenant to make necessary repairs to the interior of the premises in the exclusive control of lessee subjects the lessor to no liability until the lessee has given him notice of the need for repairs and the lessor thereafter fails to exercise reasonable care and diligence in making the repairs."

Richardson v. Weckworth, 212 Kan. 84, 509 P.2d 1113 (1973), involved a crumbling sidewalk on premises rented on a month-to-month basis. Although the landlords orally promised to repair the defective condition when notified of it, they failed to do so and one of the tenants sustained personal injuries when she fell as a result of catching her heel in one of the pockmarks in the defective sidewalk. In affirming a judgment for the tenants, the Supreme Court of Kansas recognized that "the rule pertaining to public

sidewalks and city streets should not be universally applied in landlord-tenant litigation.” Further, it refused to hold that the tenants had been contributorily negligent as a matter of law. Moreover, it refused to consider the defense of lack of consideration for a promise to repair because the defense had not been raised in the trial court. In addition, the court held that the terms “hazardous and dangerous conditions” and “unreasonable risk” are readily understandable and that the trial court had not erred in refusing to define them in its instructions to the jury.

For help in this general area, see Zinn, *The Real Estate Lease in Kansas: Some Problems of Characterization*, 17 Kan. Law Rev. 707 (1969).

Where a municipal housing code prescribes minimum housing standards, by implication a lease of urban residential property gives rise to an implied warranty by the landlord that leased premises are habitable and suitable for human occupancy in compliance with the pertinent code provisions and will remain so for the duration of the tenancy. *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974).

The recent trend among courts is to recognize an implied warranty by the lessor of urban residential property that the premises leased are suitable for human habitation and will be maintained in a suitable condition during the tenancy, regardless of existence of a municipal housing code with minimum housing standards.

The Kansas Residential Landlord and Tenant Act (K.S.A. 58-2553(a)(3)) imposes a contract and duty of reasonable care on landlords subject to the Act to “maintain in good and safe working order and condition all ... heating, ventilating ... appliances ... supplied or required to be supplied by such landlord” except when prevented by an act of God, the failure of public utility services or other conditions beyond the landlord’s control. *Jackson v. Wood*, 11 Kan. App. 2d 478, 481, 726 P.2d 796, rev. denied 240 Kan. 804 (1986).

126.33

**LANDLORD’S DUTY—NOTICE OF DEFECT
AS TO RESERVED PARTS**

A landlord is liable to a tenant and someone present with the tenant’s consent for an injury that results from a defect on a part of premises reserved for the common use of tenants when:

- 1. the landlord knew of the defect, or by the exercise of reasonable care should have known of the defect; and**
- 2. the landlord had a reasonable opportunity to repair it before the injury was sustained.**

Notes on Use

This instruction should be given with PIK 4th 126.31, Landlord’s Duty as to Reserved Parts.

Comment

For authority, see *Trimble v. Spears*, 182 Kan. 406, 320 P.2d 1029 (1958).

126.34**TENANT'S DUTY****Comment**

This instruction has been deleted. The duty owed to those formerly classified as invitees and licensees is reasonable care under all the circumstances. *Jones v. Hansen*, 254 Kan. 499, 867 P.2d 303 (1994).

126.35

**LIABILITY OF BUSINESS PROPRIETOR FOR
CRIMINAL ACTS OF THIRD PARTIES**

The owner of a business has a duty to provide security for patrons or customers on the premises when circumstances exist from which the owner could reasonably foresee there is a risk of peril above and beyond the ordinary and that appropriate security measures should be taken.

The test you must use is whether under the totality of the circumstances, a reasonable owner could foresee that patrons or customers have a risk of being victims of criminal acts above and beyond what is ordinarily expected. Some of the factors you should take into account are:

- 1. Whether the location is in a known high-crime area;**
- 2. The amount of lighting;**
- 3. The time of day that the crime was committed;**
- 4. Prior incidents involving crimes upon patrons; and**
- 5. The economic feasibility of a reasonable level of security.**

The plaintiff must also prove that there is a causal connection between the breach of this duty to provide security and the injury sustained.

Comment

For authority, see *Seibert v. Vic Regnier Builders, Inc.*, 253 Kan. 540, 856 P.2d 1332 (1993). In *Seibert* the Supreme Court adopted the “totality of the circumstances” rule of foreseeability. The court stated, “The shopping center owner is not under a duty to provide such security as will prevent attacks on the patrons—such a duty would make the owner the insurer of his patrons’ safety. Rather, if because of the totality of the circumstances the owner has a duty to take security precautions by virtue of the foreseeability of criminal conduct, such security measures must also be reasonable under the totality of the circumstances.” *Seibert v. Vic Regnier Builders, Inc.*, 253 Kan. 540, 550, 856 P.2d 1332 (1993).

The *Seibert* rule of foreseeability was applied in *Gragg v. Wichita State Univ.*, 261 Kan. 1037, 934 P.2d 121 (1997), *Weroha v. Craft*, 24 Kan. App. 2d 693, 951 P.2d 1308, *rev. denied* 264 Kan. 825 (1998), and *South v. McCarter*, 280 Kan. 85, 119 P.3d 1 (2005).

126.40

ATTRACTIVE NUISANCE

A possessor of land that maintains (*an object*) (*a condition*) that causes bodily harm to children who are trespassing on the land is liable for that bodily harm if:

- 1. the possessor knows, or in the exercise of ordinary care should know, that young children are likely to trespass upon the land, and**
- 2. the possessor knows, or in the exercise of ordinary care should know, that (*the object is on the premises*) (*the condition exists*) and that it involves an unreasonable risk of bodily harm to young children, and**
- 3. the children because of their youth either do not discover the (*object*) (*condition*) or understand the danger involved (*in meddling with it*) (*in coming into the dangerous area*), and**
- 4. one using ordinary care would not have maintained the (*object*) (*condition*) when taking into consideration the usefulness of the (*object*) (*condition*) and whether or not the expense or inconvenience to the defendant in remedying the condition would be slight in comparison to the risk of harm to children.**

Comment

For authority, see *Carter v. Skelly Oil Co.*, 191 Kan. 474, 382 P.2d 277 (1963) (in which a thirteen-year-old boy was injured in a burning oil slush pit); *Brittain v. Cubbon*, 190 Kan. 641, 378 P.2d 141 (1963), citing Restatement, Torts § 339 (1934) (involving a ten-year-old child who stepped on a nail in the scattered debris of a razed residential building); and *Gerchberg v. Loney*, 223 Kan. 446, 576 P.2d 593 (1978) (in which a five-year-old was burned at a trash incinerator).

The doctrine had its beginning in railroad turntable cases. The rule is stated and the cases are collected in *Moseley v. City of Kansas City*, 170 Kan. 585, 228 P.2d 699 (1951); *Galleher v. City of Wichita*, 179 Kan. 513, 296 P.2d 1062 (1956) (holding that where a city did not create a nuisance on lands not owned by it, its failure to abate that nuisance did not make it liable to the parents of a five-year-old boy who was drowned as a result of its maintenance); and *Shank v. Peabody Cooperative Equity Exchange*, 186 Kan. 648, 352 P.2d 41 (1960) (in which an eleven-year-old boy was killed by a lethal chemical at a grain warehouse).

The owner of a thing dangerous and attractive to children is not always liable to a child tempted by the attraction. His liability bears a relation to the character of the thing, to the comparative ease or difficulty of preventing the danger without destroying the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct under the conditions then existing. *Brittain v. Cubbon*, 190 Kan. 641, 378 P.2d 141 (1963).

In *Brittain v. Cubbon*, 190 Kan. 641, 378 P.2d 141 (1963), and *Moseley v. City of Kansas City*, 170 Kan. 585, 228 P.2d 699 (1951), it was held that the doctrine only applies to children of tender years. In the latter case, it was held inapplicable to a boy sixteen years of age of low intelligence and of backward and

arrested mentality. This case also discussed the term “tender years” and notes that the doctrine is rarely applied to children over ten years of age and in relatively few instances to older children up to fourteen.

A tractor and an attached disc, left standing in a farm field with the ignition key in the switch, in connection with which a four-year-old boy was injured, was held not to be an attractive nuisance, the owner having had no knowledge and no opportunity to know that children had or would play upon the machinery located on private property. *McGaughey v. Haines*, 189 Kan. 453, 370 P.2d 120 (1962).

The doctrine does not apply to swimming pools; it applies only to latent defects, not to patent defects. *McCormick v. Williams*, 194 Kan. 81, 83, 397 P.2d 392 (1964); *Mozier v. Parsons*, 256 Kan. 769, 887 P.2d 692 (1995).

The attractive nuisance doctrine may impose liability to trespassing children upon an owner or occupant. For discussion and a collection of cases, see *Caywood v. Board of County Commissioners.*, 200 Kan. 134, 434 P.2d 780 (1967).

Latent dangers doctrine is not confined to things hidden from the eye alone, but extends to things hidden from the appreciation of the person injured. *Bartlett v. Heersche*, 204 Kan. 392, 462 P.2d 763 (1969), *appeal after remand* 219 Kan. 148, 547 P.2d 800 (1976).

Firing a BB gun by a child in a backyard enclosed by a strong wall of substantial height, coupled with no knowledge on the part of defendant parent, makes the doctrine of attractive nuisance inapplicable. *Roberts v. Beebe*, 200 Kan. 119, 434 P.2d 789 (1967). For a discussion of the comparative negligence of a child as well as the attractive nuisance doctrine, see *Honeycutt v. City of Wichita*, 247 Kan. 250, 796 P.2d 549 (1990). Also see PIK 4th 103.02, Negligence of Children, and section 19 of the Comment to PIK 4th 105.01, Comparative Fault Theory and Effect.

The attractive nuisance doctrine or theory of recovery is limited to trespassing children. *Mozier v. Parsons*, 256 Kan. 769, 887 P.2d 692 (1995).

126.50

ABUTTING PROPERTY OWNER—DUTY

It is the duty of an owner of land adjacent to or abutting upon a (*highway*) (*street*) (*sidewalk*) to construct and maintain the structures on the owner's land so that they do not endanger the safety of travelers lawfully using the (*highway*) (*street*) (*sidewalk*).

Comment

For authority, see *Durst v. Wareham*, 132 Kan. 785, 297 P. 675 (1931), involving a structure near an alley. The rule was applied with regard to an open stairway near a sidewalk in *Bennett v. Citizen's State Bank*, 100 Kan. 90, 163 P. 625 (1917); with regard to an awning hook by which a nine-year-old pedestrian was caught in *Mitchell v. Foran*, 143 Kan. 191, 53 P.2d 490 (1936); and with regard to machinery placed in an alley in *Osage City v. Larkins*, 40 Kan. 206, 19 P. 658 (1888).

An abutting property owner is not liable for defects in a sidewalk, but this rule does not apply when the defects complained of are created by and are the result of the owner's negligence. *Harris v. McConnell*, 194 Kan. 800, 401 P.2d 908 (1965).

A landowner has a right to temporarily deposit building materials in abutting streets, if required to improve his property, even though the public may be inconvenienced to some extent. *Watson v. City of Topeka*, 194 Kan. 585, 400 P.2d 689 (1965).

A contractor doing work adjacent to a street has a duty to exercise reasonable care for the protection of those rightfully in proximity to the work. *Albright v. McElroy*, 207 Kan. 233, 484 P.2d 1010 (1971).

In a wrongful death action arising out of an accident in which decedent's car left the roadway and struck a utility pole and guy wire, the court cited Restatement (Second) of Torts, § 368 concerning liability of a possessor of land for artificial conditions near an existing highway. While it is common knowledge that vehicles on occasion leave the roadway and strike adjacent utility poles and guy wires, a duty to third persons will not be imposed upon those who erect and maintain such objects in the absence of reasonable anticipation of such deviation from the roadway as a normal incident of travel. *Schrader v. Great Plains Electric Co-op, Inc.*, 19 Kan. App. 2d 276, 868 P.2d 536 (1994).

126.65

MUNICIPALITIES—NUISANCE

A municipality is liable for injuries resulting from its creation or maintenance of a nuisance.

The term nuisance means something which unreasonably interferes with the rights of a person, whether in person, property, or enjoyment of property or comfort, and something which is an annoyance, that which annoys or causes trouble or vexation, that which is offensive or noxious, or something that works harm, inconvenience, or damage.

Comment

For authority, see *Wilburn v. Boeing Airplane Co.*, 188 Kan. 722, 366 P.2d 246 (1961).

The operation of a sewer system was held a nuisance in *Jeakins v. City of El Dorado*, 143 Kan. 206, 53 P.2d 798 (1936); and a city dump in *Steifer v. City of Kansas City*, 175 Kan. 794, 267 P.2d 474 (1954), and in *Lehmkuhl v. City of Junction City*, 179 Kan. 389, 295 P.2d 621 (1956); but a traffic condition was held not a nuisance in *Wilburn v. Boeing Airplane Co.*, 188 Kan. 722, 366 P.2d 246 (1961). No nuisance was found to have been alleged in *Weast v. Budd*, 186 Kan. 249, 349 P.2d 912 (1960), in which case a city had instituted and then abandoned eminent domain proceedings.

The distinction between a nuisance, to which governmental immunity does not attach, and negligence, to which it does attach, turns upon whether the condition was one created by the municipality itself or was one otherwise created or occurring that the municipality failed to use the requisite care in remedying. *Galleher v. City of Wichita*, 179 Kan. 513, 296 P.2d 1062 (1956) (an abandoned sand pit used as a place for fishing and swimming was an alleged dangerous place that had not been created or maintained by the city).

For a collection of cases on what constitutes a governmental function and on the exceptions to the rule of governmental immunity, see *Stolp v. City of Arkansas City*, 180 Kan. 197, 303 P.2d 123 (1956), *adhered to* 181 Kan. 225, 310 P.2d 888 (1957).

A Board of Education did not create or maintain a nuisance where an employee within the scope of his authority left a stump fire unextinguished and unattended and a child was injured thereby. Temporary nature and isolated instance prevents nuisance. *Rose v. Board of Education*, 184 Kan. 486, 337 P.2d 652 (1959).

The decisions as to nuisance are collected and classified in *Caywood v. Board of County Commissioners*, 200 Kan. 134, 434 P.2d 780 (1967), a case involving a lake operated, maintained, and open to the public as a recreational facility.

A nuisance is an annoyance, and any use of property that is offensive or endangers life or health or violates the laws of decency or unreasonably pollutes the air with foul, noxious odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of the property of another may be said to be a nuisance. The alleged use of excessive force in an arrest for double-parking and subsequent harassment by public authorities was held not to constitute a nuisance. *Allen v. City of Ogden*, 210 Kan. 136, 499 P.2d 527 (1972).

Failure to provide drainage for surface waters was held not to be actionable as a nuisance. *Baldwin v. City of Overland Park*, 205 Kan. 1, 468 P.2d 168 (1970).

Where a city contracts with another to collect and dispose of trash and retains control of the collection and disposal, the conduct of the contractor giving rise to a nuisance renders the city liable for the nuisance. *Davis v. City of Kansas City*, 204 Kan. 524, 464 P.2d 154 (1970).

PIK 4th 126.65 has been amended to be consistent with the definition of “nuisance” found in PIK 4th 103.06.

Where a nuisance has its origin in negligence, as distinguished from an absolute nuisance, contributory negligence is a defense. When tort liability is predicated on conduct less culpable than “intentional,” the rule is to compare fault and causation. *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, 628 P.2d 239 (1981).

126.70

DUTY OF INJURED PARTY

A person is required to keep a proper lookout for *(his) (her)* own safety and to use that degree of care which a reasonably careful person would exercise measured by all the circumstances then existing.

Comment

See *George v. Ayesh*, 179 Kan. 324, 295 P.2d 660 (1956), which holds that as to areas which are retained by a landlord for the benefit of his tenants in common, the landlord's duty also extends to a person expressly or impliedly invited by the tenant and also to all of those who have lawful occasion to visit the tenant for social purposes.

A pedestrian who uses a sidewalk should use due care for his own safety. *Taggart v. Kansas City*, 156 Kan. 478, 134 P.2d 417 (1943).

The rule embodied in the last sentence of the instruction was applied in *Bingham v. Hillcrest Bowl, Inc.*, 199 Kan. 40, 427 P.2d 591 (1967), where the plaintiff had slipped on a wet terrazzo floor inside the entrance to a building, held no duty to look for danger when there is no reason to do so.

Knowing that an object is present does not constitute negligence as a matter of law, even though there may be a comprehension of some risk. *Autry v. Walls I. G. A. Foodliner, Inc.*, 209 Kan. 424, 497 P.2d 303 (1972) (plaintiff tripped over a box in plain sight in the aisleway of a store).

126.80

ULTRAHAZARDOUS ACTIVITIES

When a person brings onto that person's property something which is harmless if confined, but is harmful if it escapes, that person has a duty to prevent it from escaping. That person is responsible for any damage if it escapes the person's property, regardless of the care exercised.

Comment

This statement of the early doctrine of *Rylands v. Fletcher*, L.R. 3, H.L. 330 (Eng. 1868), as a common-law principle of liability without fault, was adopted and adhered to in *State Highway Comm. v. Empire Oil & Ref. Co.*, 141 Kan. 161, 40 P.2d 355, (1935), involving the escape of oil refuse from premises, which refuse flowed down a watercourse forming a part of a state highway and when ignited, as result of a weed-burning operation, destroyed a bridge. See also *Berry v. Shell Petroleum Co.*, 140 Kan. 94, 33 P.2d 953, *reh. denied* 141 Kan. 6, 40 P.2d 359 (1934), emphasizing that liability does not spring from negligence, and that negligence is not a necessary element of the right to recover. The right to recover is based on a defendant's maintenance of the harmful substance on his land and on his permitting it to escape to the damage of a plaintiff. See also *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976).

The escape of oil, refuse, and poisonous substance over the land of another, causing damage, was held actionable in *Helms v. Eastern Kansas Oil Co.*, 102 Kan. 164, 169 P. 208 (1917).

Outside the area of products liability, the doctrine of strict liability is applicable only to abnormally dangerous activities. In *Arnold Associates, Inc. v. City of Wichita*, 5 Kan. App. 2d 301, 615 P.2d 814, *rev. denied* 229 Kan. 669 (1980), the court held that maintenance of a twelve-inch water main was not such an unusual or dangerous activity as to invoke the doctrine. The *Arnold* case was later cited in *Williams v. Amoco Production Co.*, 241 Kan. 102, 115, 734 P.2d 1113 (1987), as having adopted Sections 519 and 520, Restatement (Second) of Torts. The Supreme Court then adopted those sections and applied them to the facts of the *Williams* case in determining that, under those facts, natural gas was not an abnormally dangerous substance. For a discussion of Section 519 (the general rule for strict liability in this area) and Section 520 (the test for determining whether an activity is abnormally dangerous), see *Williams*, 241 Kan. at 114-16.

A comprehensive decision regarding the doctrine of strict liability for abnormally dangerous activities is found in the case of *Pullen v. West*, 278 Kan. 183, 189-193, 92 P.3d 584 (2004), where the Supreme Court, without determining that the discharge of commercial grade fireworks is an abnormally dangerous activity, held that a plaintiff's participation in that activity precludes him from relying on strict liability.

In *Eastman v. Coffeyville Resources Refining & Marketing*, 295 Kan. 470, 284 P.3d 1049 (2012), the court distinguished common-law strict liability from strict liability under K.S.A. 65-6203. As with common-law strict liability, K.S.A. 65-6203(a) imposes duties "regardless of any intent, negligence, or misconduct of the person responsible for [an] accidental release or discharge." Unlike common-law strict liability, the statute "does not consider whether the responsible party was engaged in an abnormally dangerous activity."

Restatement (Second) of Torts §§ 519 and 520 apply to strict liability claims when water contamination is alleged. *City of Neodesha v. BP Corporation*, 295 Kan. 298, 287 P.3d 214, Syl. ¶ 8 (2012). See also the discussion in *City of Neodesha v. BP Corporation*, 50 Kan. App. 2d 731, 334 P. 3d 830 (2014).

126.81

DANGEROUS INSTRUMENTALITIES

A person that possesses, or has under that person's control, an instrumentality that is exceptionally dangerous in character is bound to take exceptional precautions to prevent an injury being done by the instrumentality. The degree of care must be equal to the degree of danger involved.

Comment

The degree of care must be commensurate with the danger involved. See *Wroth v. McKinney*, 190 Kan. 127, 373 P.2d 216 (1962), concerning a loaded revolver. This rule applies in the transportation of natural gas. *Sternbock v. Consolidated Gas Utilities Corp.*, 151 Kan. 81, 98 P.2d 162 (1940).

The owner of so inherently dangerous a commodity as solidified glycerine must exert the highest degree of care to prevent its doing mischief and such a duty never ceases. *Clark v. Powder Co.*, 94 Kan. 268, 146 P. 320, (1915).

A high-voltage line is one of the most dangerous things known to man and distributors of electricity maintaining electric power lines are under the highest degree of care to protect the public from danger. *Cope v. Kansas Power & Light Co.*, 192 Kan. 755, 391 P.2d 107 (1964).

This instruction was approved in *Negley v. Massey Ferguson, Inc.*, 229 Kan. 465, 473, 625 P.2d 472 (1981).

In a case where a parent sought to impose liability upon the father of another minor who had shot and killed her child with a handgun, *Long v. Turk*, 265 Kan. 855, 962 P.2d 1093 (1998), the Supreme Court ruled that a .357 Magnum handgun is a dangerous instrumentality, and the highest degree of care is required in the safeguarding of such a handgun.

The Supreme Court again applied a dangerous instrumentality standard in *Shirley v. Glass*, 297 Kan. 888, 308 P.3d 1 (2013). A man with convictions for violent felonies was involved, along with his grandmother, defendant Glass, in the purchase of a shotgun. He later used the gun to kill his eight year old son and himself. The court wrote that “. . . those in possession of firearms should exercise the highest standard of care in deterring the possession of those firearms by those who are at special risk to misuse the weapons. The legislature has determined that certain convicted felons fall within that special-risk group, and a firearms dealer must exercise the highest standard of care in order to avoid selling guns to such felons.” 297 Kan. at 901.

126.90

ANIMALS—RUNNING AT LARGE

An owner of livestock must use due care to keep the livestock from running at large.

To “run at large” means to stroll without restraint or confinement, to wander, rove, or ramble at will without restraint.

An owner of livestock is liable for damages caused by the livestock running at large, if the owner knows or through the use of reasonable care should know that the livestock *(is)(are)* running at large.

An owner is not liable for damages caused by livestock that escape from an enclosure or pen which the owner, through the use of reasonable care, constructed or maintained in such a way as to confine livestock of that kind.

If the livestock escape(s), even without the owner’s fault, the owner has the duty to use reasonable care to recover the livestock.

Notes on Use

For the definition of “livestock,” see K.S.A. 47-120(b).

Comment

See K.S.A. 47-122 and 47-123. In *Wilson v. Rule*, 169 Kan. 296, 219 P.2d 690 (1950), a case dealing with a collision between an automobile and a mule, the Supreme Court in interpreting K.S.A. 47-122 and 47-123, required the plaintiff to show some evidence that the owner of the mule had failed to exercise due care in enclosing it, in order to recover. *Abbott v. Howard*, 169 Kan. 305, 219 P.2d 696 (1950), reaffirms the requirement to show negligence in a case involving the collision between an automobile and a horse. See *Clark v. Carson*, 188 Kan. 261, 362 P.2d 71 (1961), which deals with the collision of an automobile and a cow.

Evidence of prior escapes of defendant’s horses was properly admitted for the limited purpose of establishing a duty to take reasonable precautions to prevent the future escape of his horses. *Cooper v. Eberly*, 211 Kan. 657, 508 P.2d 943 (1973). See also *Walborn v. Stockman*, 10 Kan. App. 2d 597, 706 P.2d 465 (1985).

In *Wrinkle v. Norman*, 297 Kan. 420, 301 P.3d 312 (2013), the court considered a case in which the plaintiff was injured attempting to return cattle running at large to a pen on a neighbor’s property. Considering the duty of care owed the plaintiff, who entered the property without express permission, the court adopted Restatement (Second) of Torts §§ 197 and 345, with some modifications to comport with Kansas comparative negligence and premises liability law. Together the sections “create a presumption of implicit permission for one party to enter the property of another in order to prevent certain kinds of serious harm, and the possessor of the property has a duty of reasonable care to protect the wellbeing of the person exercising that privilege.” 297 Kan. at 424. See PIK 4th 126.21, Duty to Trespasser, and PIK 4th 126.22, Private Necessity—Entering or Remaining on Property to Prevent Serious Harm.

126.91

ANIMALS—VICIOUS

An owner who knows, or in the exercise of reasonable care should know, that an animal is vicious should confine it and see that it does no injury. The owner is bound to use that care necessary to prevent injury.

Comment

When the owner of a known breach and vicious mule permitted it to escape, he was liable for all damage that resulted from its viciousness. *Carl, Administratrix v. Ackard*, 114 Kan. 640, 220 P. 515 (1923) (an action for wrongful death).

The owner of a vicious animal must keep it safely. *Steely v. Lucas*, 112 Kan. 780, 212 P. 905 (1923). The degree of care is stated and domestic animals referred to in *Hartman v. Atchison, T. & S. F. R. Co.*, 94 Kan. 184, 146 P. 335 (1915) (involving a cow). The rule was applied to the owner of a vicious dog in *Hahn v. Kordula*, 5 Kan. App. 142, 48 P. 896 (1897).

In adopting the doctrine of strict liability for a possessor of a wild animal who does harm to another, the court cited this instruction and *Carl, Administratrix v. Ackard*, 114 Kan. 640, 220 P. 515 (1923), to support its conclusion that Kansas appears to impose the same doctrine of strict liability as imposed on owners of vicious domestic animals. It also found that the comparative fault principles of K.S.A. 60-258a are applicable to strict liability cases. *Mills v. Smith*, 9 Kan. App. 2d 80, 673 P.2d 117 (1983).

Kansas does not impose liability on a landlord for the injuries inflicted upon a third person by a tenant's vicious dog. Only the owner, possessor, keeper, or harbinger of a vicious animal can be held liable for its actions. *Colombel v. Milan*, 24 Kan. App. 2d 728, 952 P.2d 941 (1998).

126.92

ANIMALS—ORDINARILY GENTLE

One who keeps an animal possessing only those dangerous propensities that are normal to the members of its class is required to know its normal habits and tendencies. That person is required to know that even ordinarily gentle animals are likely to become dangerous under particular circumstances, and to exercise reasonable care to prevent foreseeable harm.

Comment

See *Gardner v. Koenig*, 188 Kan. 135, 360 P.2d 1107 (1961), citing The Restatement of Law, Torts § 518 (1938), in which a cause of action was held stated for injury resulting from the alleged negligence of a sales barn owner in turning a nervous and unruly cow into a sales ring, unescorted and unattended. It was stated that the proprietor should have anticipated that some cows would become nervous and uncontrollable, and that they would resort to dangerous behavior if driven into a small enclosure, such as a sales ring, in the presence of numerous spectators, where unfamiliar noises and confusion would be encountered.

The trial court properly applied the rule in sustaining a directed verdict for the defendant in a case in which the defendant's horse had fallen while the plaintiff was riding it. *McKinney v. Cochran*, 197 Kan. 524, 419 P.2d 931 (1966).

Liability for bodily injury caused by dogs falls within this rule. *Berry v. Kegans*, 196 Kan. 388, 411 P.2d 707 (1966).

In an action by a social guest or licensee who was injured while riding one of defendant's horses upon defendant's property, the court held that the law relating to injury caused by an animal is the proper law to apply as opposed to the rules of law pertaining to premises liability. *Mercer v. Fritts*, 236 Kan. 73, 689 P.2d 774 (1984).

Essentially, *Mercer* recognized a limited active negligence exception to the premises liability doctrine when it held that animal law rather than premises law applied. A more recent case, *Bowers v. Ottenad*, 240 Kan. 208, 729 P.2d 1103 (1986), has been construed to extend the active negligence exception to all situations where a licensee is injured by the negligent activity of the landowner. See also Alvarez, *Premises Law—The Return of The Active Negligence Exception*, 56 J.B.A.K. (April 1987) at p. 15.

126.93**DOMESTIC ANIMAL ACTIVITY—ASSUMPTION OF RISK**

A participant who engages in a domestic animal activity assumes the inherent risks associated with such activity. The participant cannot recover against a domestic animal sponsor or domestic animal professional for an injury or loss resulting from an inherent risk.

Notes on Use

For authority, see K.S.A. 60-4002. Assumption of risk is an affirmative defense. K.S.A. 60-208 requires that it be pled. For the definition of “domestic animal activity,” “domestic animal sponsor,” and “domestic animal professional,” see K.S.A. 60-4001.

PIK 4th 126.94, Domestic Animal Activity—Inherent Risks, should be used in conjunction with this instruction. See PIK 4th 126.95, Domestic Animal Activity—Risks Not Assumed, when a domestic animal sponsor, domestic animal professional, or other person may be liable for injuries sustained by a participant in a domestic animal activity.

126.94

DOMESTIC ANIMAL ACTIVITY—INHERENT RISKS

Inherent risks of domestic animal activities are those dangers or conditions that are an integral part of domestic animal activities, including, but not limited to insert one or more of the following:

- **the propensity of a domestic animal to run, buck, bite, shy, stumble, rear, fall, step on, or behave in ways that may result in injury, harm, or death to persons on or around them;**
- **the unpredictability of a domestic animal's reaction to such things as sounds, sudden movement, and unfamiliar objects, persons, or animals;**
- **certain hazards such as surface and subsurface conditions;**
- **collisions with other domestic animals or objects; and**
- **the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the domestic animal or not acting within such participant's ability.**

Notes on Use

For authority, see K.S.A. 60-4001(f). "Participant" means any person who engages in a domestic animal activity. K.S.A. 60-4001(g).

126.95

DOMESTIC ANIMAL ACTIVITY—RISKS NOT ASSUMED

A participant in a domestic animal activity does not assume the inherent risks of such activity if the *(domestic animal activity sponsor) (domestic animal professional) (person)* insert one or more of the following :

- provided faulty equipment or tack that was a cause of the injury;
- provided the domestic animal and failed to make a reasonable effort to determine the participant's ability to manage the particular domestic animal based on the participant's representations of the participant's ability;
- owned, leased, rented, or otherwise lawfully possessed and controlled the land or facilities upon which the participant sustained injuries because of a dangerous condition which was known to the *(domestic animal activity sponsor) (domestic animal professional) (person)* and not made known to the participant;
- committed an act or omission that fell below the standard of care of a reasonable *(domestic animal activity sponsor) (domestic animal professional) (person)* engaged in domestic animal activities in the same locality; or
- injured the participant by willful, wanton or intentional conduct.

Notes on Use

For authority, see K.S.A. 60-4003(a). "Participant" means any person who engages in a domestic animal activity. K.S.A. 60-4001(g).

126.96

**DOMESTIC ANIMAL PROFESSIONAL—POSTING
REQUIREMENT**

A domestic animal professional who owns, manages, or controls a stable, corral, boarding area, or arena where the professional conducts domestic animal activities shall post and maintain signs in or near the stable, corral, boarding area, or arena that contain the following warning notice:

WARNING

Under Kansas law, there is no liability for an injury to or the death of a participant in domestic animal activities resulting from the inherent risks of domestic animal activities, pursuant to K.S.A. 60-4001 through K.S.A. 60-4004. You are assuming the risk of participating in the domestic animal activity.

Such signs shall appear in a clearly visible location. The warning notice shall appear on the sign in black letters, with each letter to be a minimum of one inch in height.

Notes on Use

For authority, see K.S.A. 60-4004. But see use of the term “equine professional” in K.S.A. 60-4004(a) and consider whether that term limits the application of the posting requirement. Definitions of “domestic animal professional” and “participant” are found in K.S.A. 60-4001.

A. ASSAULT AND BATTERY

127.01

ASSAULT DEFINED

An assault is an intentional threat or attempt, coupled with apparent ability, to do bodily harm to another, resulting in immediate apprehension of bodily harm. No bodily contact is necessary.

Comment

An assault is an apparently violent attempt, or a willful offer with force or violence, to do corporal injury to another, without the actual doing of the injury threatened, as by lifting the fist or a cane in a threatening manner. Neither actual intent nor actual present ability to do the injury threatened is necessary if the circumstances are such that the person threatened reasonably believes the injury will be done. *State v. Hazen*, 160 Kan. 733, 740, 741, 165 P.2d 234 (1946). Plaintiff need not show a fear of being beaten or severely injured to establish a claim for assault. *Stapp v. Overnite Transp. Co.*, 995 F. Supp. 1207 (D. Kan. 1998). “[W]ords can constitute assault if ‘together with other acts or circumstances they put the other in reasonable apprehension of imminent harmful or offensive contact with his person.’” Restatement (Second) of Torts § 31 (1964) quoted in *Vetter v. Morgan*, 22 Kan. App. 2d 1, 4, 913 P.2d 1200 (1995).

Mere words, however gross and abusive or insulting, and even though spoken for the purpose of provoking an assault, are no defense to an action for assault and battery. *State v. Hardisty*, 122 Kan. 527, 529, 253 P. 615 (1927).

In considering a state pendent claim for assault, the United States District Court for the District of Kansas held that whether plaintiff, a student athlete at defendant community college, was in immediate apprehension of bodily harm was a question of fact to be decided by the jury where defendant’s baseball coach had lined up players and was conducting a “cup check”—to see if players were wearing a liner in their athletic supporters designed to protect the male genitalia—with a baseball bat and plaintiff stepped back and agreed to take a fine out of fear of being struck as the coach approached with the bat. *Lesser v. Neosho County Community College*, 741 F. Supp. 854 (D. Kan. 1990).

The act of a supervisor in slapping a female employee on her buttocks was held to constitute a battery and a subsequent remark by the supervisor that he felt like repeating the act constituted assault. *Campbell v. Kansas State University*, 780 F. Supp. 755 (D. Kan. 1991).

The element of immediate apprehension of bodily harm was proven where plaintiff testified she was “scared and upset” and did not know what the aggressor was going to do, although plaintiff did not think the aggressor was going to “beat her up” and she stayed in the same room with the aggressor after the aggressor shoved her. *Taiwo v. Vu*, 249 Kan. 585, 822 P.2d 1024 (1991).

127.02

BATTERY DEFINED

A battery is the unprivileged touching or striking of one person by another, done with the intent to cause a contact, or an apprehension of contact, that is harmful or offensive.

Notes on Use

An action based on use of force by an officer may require instructions on negligence (PIK 4th 103.01), battery (above), wanton conduct (PIK 4th 103.03), malice (PIK 4th 103.05) and punitive damages (PIK 4th 171.44).

Comment

An intent to injure is a prerequisite in battery cases. *Murray v. Modoc State Bank*, 181 Kan. 642, 646, 313 P.2d 304 (1957).

A master is liable for assaults committed by his servant upon a customer, patron, or other invitee, where such assaults are committed by the servant while acting within the scope of his employment. *Murray v. Modoc State Bank*, 181 Kan. 642, 654, 313 P.2d 304 (1957).

The gravamen of a civil assault and battery is grounded upon the actor's intention to inflict injury. *Stricklin v. Parsons Stockyard Co.*, 192 Kan. 360, 366, 388 P.2d 824 (1964).

The "intent to injure" is a necessary element of the intentional tort of battery. The intent to injure "can be satisfied in alternative ways — either by (1) an intent to cause a harmful bodily contact, that is, to cause the other physical injury; or by (2) an intent to cause an offensive bodily contact, that is, to invade the other's reasonable sense of personal dignity. Both states of mind are sufficiently culpable to justify imposing civil battery liability for damages, including any physical injury that is legally caused by the resulting bodily contact." *McElhaney v. Thomas*, 307 Kan. 45, 405 P.3d 1214 (2017), disapproved contrary language and the nebulous concept of "horseplay" in *Stricklin v. Parsons Stockyard Co.*, 192 Kan. 360, 366, 388 P.2d 824 (1964).

Damages for personal injuries may be recovered for an unlawful, forcible, and malicious battery even though the wrongful act may have also violated a criminal statute. *Carrick v. McFadden*, 216 Kan. 683, 533 P.2d 1249 (1975).

In *Dauffenbach v. City of Wichita*, 8 Kan. App. 2d 303, 657 P.2d 582, *affirmed* 233 Kan. 1028, 667 P.2d 380 (1983), plaintiff became obstreperous and verbally abusive when asked by officers for his driver's license after he appeared at the scene of an attempted burglary. Plaintiff was never arrested but the officers met his attempt to leave and a swing at one of them with the use of force. Plaintiff was flung to the ground and received injuries that rendered him paraplegic. In granting judgment for defendants the trial court concluded that a peace officer is presumed to have acted properly until that presumption is overcome by clear and convincing evidence. The Court of Appeals reversed, holding that an officer is not entitled to that presumption as part of plaintiff's burden of proof.

The original cause pleaded was battery. It was amended to negligence in the use of unreasonable force. The opinion of the Court of Appeals, adopted verbatim for the most part by the Supreme Court, discusses liability of an officer for the use of force and identifies three bases: "The officer may not ... use an unreasonable amount of force or wantonly or maliciously injure a suspect." *Dauffenbach*, 8 Kan. App. 2d

at 308. The use of an unreasonable amount of force is equated with negligence: “We see no reason to make a distinction between a traffic accident which involves a motor vehicle driven by a law enforcement officer (or the felling of a tree) and the unreasonable use of force.” *Id.*, 8 Kan. App. 2d at 309.

Reference is made to K.S.A. 21-3215(1) [now K.S.A. 21-5227(a)], which places limits upon the force an officer can use in making an arrest. The court says compliance with that statute is a defense to a criminal charge and there is no reason why the criminal and civil liability of an officer should not be coextensive. The use of force likely to cause great bodily harm may be negligence per se. *Id.*, 8 Kan. App. 2d at 310.

In *Caplinger v. Carter*, 9 Kan. App. 2d 287, 676 P.2d 1300 *rev. denied* 235 Kan. 1041 (1984), the trial court granted summary judgment for defendants in an action based on, inter alia, battery. Plaintiffs’ discovery evidence showed plaintiffs were beaten and kicked during the course of arrest and booking, and after release from custody, on misdemeanor charges of obstructing an official duty and disorderly conduct arising from stop of an automobile to investigate the sobriety of the driver. Respecting the cause for battery, the Court of Appeals found erroneous the trial court’s holding that the officers had immunity under the Kansas Tort Claims Act, K.S.A. 75-6101 *et seq.* The court quotes from *Dauffenbach*, 233 Kan. 1028, 667 P.2d 380 (1983), and says that none of the exceptions to liability contained in the Kansas Tort Claims Act “were intended to permit police officers to violate the prohibition in *Dauffenbach* that they shall not use unreasonable force.” 9 Kan. App. 2d at 295.

The rules applicable to a determination of whether an officer was justified in the use of deadly force to prevent the escape of a fleeing suspect are stated in *Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987).

In *Smith v. Welch*, 265 Kan. 868, 967 P.2d 727 (1998), an action for assault, battery, sexual battery and outrage against a neurologist employed as an independent medical examiner by the defendant in an automobile negligence case, plaintiff testified the physician groped and fondled her breasts and attempted to fondle her pubic area. Plaintiff’s expert testified such actions were unnecessary and inappropriate in a neurological examination for head and neck injuries. The ruling of the trial court granting summary judgment for the physician was reversed, the Supreme Court holding that a traditional physician-patient relationship was not created, that unless consented to every medical examination is a technical invasion of privacy, battery or trespass, regardless of result, and that a physician-patient relationship is irrelevant in a claim for an intentional tort.

127.03**LIABILITY FOR ASSAULT AND BATTERY**

Every person has a right to immunity from assault and battery, and to complete protection against any violence whatever, whether injury results from it or not. If you find from the evidence that the defendant committed an unjustified assault or battery upon the plaintiff, then the defendant is liable for damages sustained as the result of the wrongful act.

Notes on Use

This instruction should follow PIK 4th 127.01, Assault Defined, or PIK 4th 127.02, Battery Defined, depending on whether assault or battery or both are involved.

Comment

An assault upon another is an intentional infringement upon the absolute right of personal security, for which the law gives a right of action against the wrongdoer. Damages for mental suffering may be awarded although there is no battery or bodily injury inflicted. *Whitsel v. Watts*, 98 Kan. 508, 159 P. 401 (1916); *Lonergan v. Small*, 81 Kan. 48, 105 P. 27 (1909).

127.04

SELF-DEFENSE—USE OF FORCE IN DEFENSE OF A PERSON

(Plaintiff) (Defendant) claims *(his) (her)* use of force was permitted as *(self-defense) (the defense of another person)*.

(Plaintiff) (Defendant) is permitted to insert one of the choices from below:

- use physical force against another person [—including using a weapon—] [—including through the actions of another—]
- or
- threaten by words or actions to use physical force against another person [—including a threat to cause death or great bodily harm—]
- or
- display to another person a insert the means of force used

when and to the extent that it appears to *(him) (her)* and *(he) (she)* reasonably believes such *(physical force) (threat) (display)* is necessary to defend *(himself) (herself) (someone else)* against the other person's imminent use of unlawful force. Reasonable belief requires both a belief by *(plaintiff) (defendant)* and the existence of facts that would persuade a reasonable person to that belief.

[*(Plaintiff) (Defendant)* is permitted to use against another person physical force that is likely to cause death or great bodily harm only when and to the extent that it appears to *(him) (her)* and *(he) (she)* reasonably believes such force is necessary to prevent death or great bodily harm to *(himself) (herself) (someone else)* from the other person's imminent use of unlawful force. Reasonable belief requires both a belief by *(plaintiff) (defendant)* and the existence of facts that would persuade a reasonable person to that belief.]

When use of force is permitted as *(self-defense) (defense of someone else)*, there is no requirement to retreat.

[You must presume that a person had a reasonable belief that use of physical force likely to cause death or great bodily harm was necessary to prevent imminent death or great bodily harm to *(himself) (herself) (someone else)* if you find the following:

1. at the time the force likely to cause death or great bodily harm was used, the individual against whom the force was used insert one of the choices from below:

- *(was unlawfully or forcefully entering) (had unlawfully or forcefully entered) and was presently within the (dwelling) (place of work) (occupied vehicle) of the person using the force; [and]*
 - *(had removed) (was attempting to remove) a person against that person's will from the (dwelling) (place of work) (occupied vehicle) of the person using the force; [and]*
2. the person using the force knew or had reason to believe *insert the applicable condition described in paragraph 1* [.]
- [; and 3. if the person against whom force was used was a law enforcement officer who *(had entered) (was attempting to enter) the (dwelling) (place of work) (occupied vehicle) in the lawful performance of the officer's duties, the person using the force did not know and should not reasonably have known that the person who (entered) (attempted to enter) was a law enforcement officer.*]

This presumption may be overcome if you are persuaded that the person did not reasonably believe that use of force likely to cause death or great bodily harm was necessary to prevent imminent death or great bodily harm to *(himself) (herself) (someone else)*.

Notes on Use

For authority, see K.S.A. 21-5222. K.S.A. 21-5231 confers immunity from civil actions upon persons justified in using force pursuant to that statute. It is not clear to the Committee whether the common law is thereby wholly displaced.

The appropriate language in brackets should be given when there is evidence that deadly force was used.

It may be helpful in some cases to insert the names of plaintiff or defendant and the other persons in place of the terms “plaintiff,” “defendant,” “another person,” and “someone else.”

The instruction is not required if the force used by defendant in the claimed self-defense is excessive as a matter of law. *State v. Marks*, 226 Kan. 704, 712-13, 602 P.2d 1344 (1979); *State v. Gayden*, 259 Kan. 69, 910 P.2d 826 (1996). If this instruction is given, an instruction on Affirmative Defenses—Burden of Proof, should be given. See PIK 4th 106.01.

To qualify for an instruction on self-defense, there must be some evidence presented at trial that the defendant reasonably believed force was necessary to defend himself. *State v. Sims*, 265 Kan. 166, 169, 960 P.2d 1271 (1998).

In certain cases a party may claim the use of force was justified both as self-defense and as the defense of another person. The first paragraph of this instruction may be modified by inserting “and” between “self-defense” and “the defense of another person.” However, the second paragraph must be modified by inserting the word “or” between “(himself)(herself)” and “(someone else)” to make it clear that

the jury may find justification as self-defense alone or as the defense of another person alone and need not find both justifications. *State v. Scott*, 271 Kan. 103, 115, 21 P.3d 516 (2001).

K.S.A. 21-5231 provides that a person is not justified in using force against a law enforcement officer who “was acting in the performance of such officer’s official duties and the officer identified the officer’s self in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer.” Thus, in the appropriate case, the last bracketed paragraph of the instruction, numbered 3, should be included in the instruction.

Comment

In *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985), the Court disapproved PIK—Criminal 2d 54.17 in the use of “immediate” in lieu of the statutory “imminent.” The Court held it to be reversible error to use the word “immediate” in the self-defense instruction in that it places undue emphasis on the immediate action of the aggressor whereas the nature of the buildup of terror and fear which had been going on over a period of time, particularly in battered spouse instances, may be most relevant. The word “imminent” would describe this defense more accurately, as the definition implies “impending or near at hand, rather than immediate.” See also *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986).

127.05

SELF-DEFENSE—APPARENT NECESSITY

Notes on Use

This instruction has been deleted and is now incorporated in PIK 4th 127.04.

127.06

INITIAL AGGRESSOR'S USE OF FORCE

A person who initially provokes the use of force against *(himself) (herself) (someone else)* is not permitted to use force to defend *(himself) (herself) (someone else)* unless:

(the person reasonably believes that *[he] [she]* is in present danger of death or great bodily harm, and *[he] [she]* has used every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the other person).

or

(the person has in good faith withdrawn from physical contact with the other person and indicates clearly to the other person that *[he] [she]* desires to withdraw and stop the use of force, but the other person continues or resumes the use of force).

Notes on Use

For authority, see K.S.A. 21-5226(c). K.S.A. 21-5231 confers immunity from civil actions upon persons justified in using force pursuant to that statute. It is not clear to the Committee whether the common law is thereby wholly displaced.

Comment

The instruction was cited with approval in *State v. Beard*, 220 Kan. 580, 581, 552 P.2d 900 (1976); and in *State v. Hartfield*, 245 Kan. 431, 445, 781 P.2d 1050 (1989).

It is not error to give initial aggressor instructions where the question whether defendant was an aggressor is one of fact for the jury. *State v. Hunt*, 257 Kan. 388, 894 P.2d 178 (1995).

127.07**DEFENSE OF SERVANT OR RELATIVE****Notes on Use**

This instruction has been deleted and is now incorporated in PIK 4th 127.04.

127.08

**LIABILITY OF EMPLOYER FOR ASSAULT AND
BATTERY BY EMPLOYEE**

An employer is liable for assault and battery committed by *(his) (her)* employee upon a third person when the act is done by authority of the employer, either express or implied, or when the act is done by the employee within the scope of *(his) (her)* employment.

Notes on Use

PIK 4th 107.06, Scope of Authority, may be applicable if there is an issue as to scope of authority.

Comment

An employer is not liable for a tortious act committed by his employee, including an assault and battery upon a third person, unless the act be done by authority of the employer, either express or implied, or unless the act be done by the employee in the course of or within the scope of his employment. *Beggerly v. Walker*, 194 Kan. 61, 64, 397 P.2d 395 (1964); *Hamilton v. Neff*, 189 Kan. 637, 371 P.2d 157 (1962); *Murray v. Modoc State Bank*, 181 Kan. 642, 654, 313 P.2d 304 (1957).

Beggerly v. Walker, 194 Kan. 61, 397 P.2d 395 (1964), recognizes that where an employee's duty involves the preservation of peace and order on the employer's property, or the protection of the employer's property, the use of force falls within the scope of the employee's employment.

See also 34 A.L.R. 2d 372 and 6 Am. Jur. 2d, Assault and Battery § 140.

127.09**ELEMENTS OF DAMAGES****Notes on Use**

It is the opinion of the Committee that the elements of compensatory damages are adequately covered in PIK 4th 171.02, Types of Damages Allowed—Personal Injury, and that the elements of punitive damages are adequately covered in PIK 4th 171.44, Punitive Damages.

Comment

The fact that the defendant in an action for damages for assault and battery was actuated by malice in striking the plaintiff will not sustain a verdict for punitive damages when no actual damages are awarded. *Lewis v. Victory Oil Co.*, 170 Kan. 660, 663, 228 P.2d 709 (1951); *Behymer v. Milgram Food Stores, Inc.*, 151 Kan. 921, 101 P.2d 912 (1940); *Shore v. Shore*, 111 Kan. 101, 103, 205 P. 1027 (1922).

Damages for mental suffering may be awarded although there was no bodily injury inflicted. *Lonergan v. Small*, 81 Kan. 48, 105 P. 27 (1909).

There is no requirement that inquiry be made into the financial status of a defendant before the issue of punitive damages may be submitted to the jury. *Carrick v. McFadden*, 216 Kan. 683, 533 P.2d 1249 (1975).

B. FALSE ARREST

127.20

FALSE ARREST OR IMPRISONMENT DEFINED

***(False imprisonment) (False arrest)* is the restraint of the personal freedom of an individual without legal excuse by any words, acts, threats, or personal violence that under the circumstances the one being restrained fears to disregard.**

Notes on Use

In most intentional tort cases, actions for false imprisonment will be joined with assault and battery. The action of false imprisonment always includes the elements of an assault in the technical sense. If the assault is combined with battery, it does not change the character of the action, but merely serves to affect the actual damages sustained by the plaintiff.

Comment

The nature and character of the action of false imprisonment are discussed in *Comer v. Knowles*, 17 Kan. 436 (1877). The *Comer v. Knowles* case was followed in *Perry v. Kress & Co.*, 187 Kan. 537, 358 P.2d 665 (1961); *Cordell v. Standard Oil Co.*, 131 Kan. 221, 289 P. 472 (1930); *Gariety v. Fleming*, 121 Kan. 42, 45, 245 P. 1054 (1926); *Thompson v. General Finance Co., Inc.*, 205 Kan. 76, 468 P.2d 269 (1970); and *Munsell v. Ideal Food Stores*, 208 Kan. 909, 494 P.2d 1063 (1972). It is essential that the restraint be against the plaintiff's will; and "if one agrees of one's own free choice to surrender freedom of motion, as by remaining in a room or accompanying another voluntarily, to clear oneself of suspicion or to accommodate the desires of the other, rather than yielding to the constraint of a threat, then there is no imprisonment." "Prosser and Keeton on the Law of Torts (5th ed.) p 49 § 11 quoted in *Wright v. Montgomery Ward & Co., Inc.*, 814 F. Supp. 986, 989 (D. Kan. 1993), *aff'd* 25 F.3d 1059 (10th Cir. 1994).

Damages for fright, nervousness, and mental anguish may be recovered where the plaintiff was unlawfully imprisoned. It is for the jury to set the amount. *Cordell v. Standard Oil Co.*, 131 Kan. 221, 289 P. 472 (1930).

Malice and willfulness are not essential elements of false arrest or false imprisonment, and the motives of the defendant, whatever they may have been, are not material so far as a right of action is concerned, and can never be material except where something more than compensatory damages are sought. If exemplary damages are sought, proof of malice in making the arrest or in imposing the restraint is competent. *Lemmon v. King*, 95 Kan. 524, 148 P. 750 (1915); *Garnier v. Squires*, 62 Kan. 321, 324, 62 P. 1005 (1900).

PIK 2d 14.20 [PIK 4th 127.20] and the comments thereunder on malice and willfulness were approved in *Thompson v. General Finance Co., Inc.*, 205 Kan. 76, 468 P.2d 269 (1970).

The Kansas Supreme Court cites with approval PIK 2d 14.20 [PIK 4th 127.20] in *Munsell v. Ideal Food Stores*, 208 Kan. 909, 494 P.2d 1063 (1972).

127.21

FALSE ARREST—DIRECTION BY DEFENDANT

[It is not necessary that an arrest be directly ordered by the defendant but it must appear that the defendant either instigated it, assisted in it, or by some means directed or encouraged it.]

[The defendant need not be present when the arrest is actually made. However, *(he) (she)* must take some active part in causing the arrest. That is, there must be some affirmative act on *(his) (her)* part which induces another to make the arrest.]

However, a defendant would not be liable for false arrest where *(he) (she)* merely states to a law officer *(his) (her)* knowledge of a supposed *(violation) (offense)* and the officer makes the arrest entirely upon *(his) (her)* own judgment and discretion.

Notes on Use

This instruction should be given in addition to PIK 4th 127.20, False Arrest or Imprisonment Defined, when there is a dispute whether the defendant directed, requested, commanded or otherwise caused the plaintiff's arrest. Use the applicable bracketed paragraph.

Comment

One who seeks to recover for false arrest must prove the unlawful arrest by defendant and, though it is not necessary that the defendant directly order the arrest, it must appear that the defendant either instigated it, assisted in it, or by some means directed or encouraged it. *Thurman v. Cundiff*, 2 Kan. App. 2d 406, 580 P.2d 893 (1978).

What is direction or instigation sufficient to impose liability on a private citizen depends upon the facts of each case. It may be proved by circumstantial evidence. *Id.*

The mere giving of information to a law officer tending to show that a crime has been committed is not enough to render the informer liable for a false imprisonment by the officer. *Id.*

127.22

LEGAL EXCUSE—OFFICER

A legal excuse for the restraint of the personal freedom of an individual is a defense to an action for *(false imprisonment) (false arrest)*.

A legal excuse exists when a law enforcement officer arrests a person under any of the following circumstances:

[The officer has a warrant commanding that the person be arrested.]

[The officer has probable cause to believe that a warrant for the person's arrest has been issued in this state or in another jurisdiction for a felony committed therein.]

[The officer has probable cause to believe that the person is committing or has committed a felony.]

[The officer has probable cause to believe that the person has committed a misdemeanor and further has probable cause to believe:

(The person will not be apprehended or evidence of the crime will be irretrievably lost unless the person is immediately arrested;)

(The person may cause injury to himself or others or damage to property unless *(he) (she)* is immediately arrested;)

(The person has intentionally inflicted bodily harm to another person.)]

[Any crime, except a traffic infraction, has been or is being committed in the officer's view.]

Probable cause exists if the facts and circumstances within the arresting officer's knowledge and of which *(he) (she)* has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been committed and, if required, that additional circumstances exist justifying the arrest.

Notes on Use

If the alleged restraint was by a merchant or his employee who had reasonable grounds for believing the person restrained was committing the offense of shoplifting, see PIK 4th 127.23, Detention for Shoplifting—Merchant's Defense.

Comment

As pointed out in *State v. Flummerfelt*, 235 Kan. 609, 612, 684 P.2d 363 (1984), prior to adoption of the Kansas Code of Criminal Procedure in 1970, the limits of a law enforcement officer's power to arrest

had not been statutorily defined. K.S.A. 22-2401 specifies the authority of a law enforcement officer to arrest, and the statute is set forth in substance in this instruction.

If the defendant relies upon lawful arrest as a legal excuse, the burden is upon the defendant to prove that such arrest was lawful.

A private person arrests without a warrant at his peril, and unless it can be shown that a felony has actually been committed, an action for false imprisonment will lie. *Garnier v. Squires*, 62 Kan. 321, 62 P. 1005 (1900).

Probable cause for making an arrest is a complete defense to an action for unlawful arrest. When a party alleges that he was arrested without a warrant, that he was tried and found guilty in police court, and that the action was dismissed after an appeal to the district court, he fails to state a cause of action because a judgment of conviction in a police court obtained without perjury, fraud, or corruption is a conclusive determination that there was probable cause for the arresting officer to believe the defendant guilty of the alleged offense. *Hill v. Day*, 168 Kan. 604, 215 P.2d 219 (1950).

In *Alvarado v. City of Dodge City*, 238 Kan. 48, 708 P.2d 174 (1985), an action for false arrest, it was held error to fail to instruct on probable cause where the merchant's defense (K.S.A. 21-3424[c]) [now K.S.A. 21-5411(d)] was asserted, which permits detention on probable cause to believe shoplifting has occurred or is about to. See PIK 4th 127.23. Probable cause is the basis of the legal excuse set forth in paragraphs 2, 3, 4 and 5 of this instruction. The definition of probable cause as reasonable belief is adapted from *State v. Abu-Isba*, 235 Kan. 851, 854, 685 P.2d 856 (1984).

In an action for false arrest by police officers acting without a warrant, it was held that, under Kansas law, the determination of probable cause at a preliminary hearing is prima facie evidence of probable cause to arrest, which may be overcome by a preponderance of the evidence. *Thompson v. City of Lawrence, Kansas*, 58 F.3d 1511 (10th Cir. 1995).

127.23

DETENTION FOR SHOPLIFTING—MERCHANT’S DEFENSE

Any merchant, (*his*) (*her*) agent, or employee, who reasonably believes that a person has actual possession of and has wrongfully taken or is about to wrongfully take merchandise from a mercantile establishment, may detain such person on the premises or in the immediate vicinity in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession. Reasonable detention under these circumstances does not constitute an arrest nor an unlawful restraint.

A wrongful taking is the willful obtaining or exerting of unauthorized control over property of another with the intent to deprive the owner permanently or temporarily of the possession, use or benefit of (*his*) (*her*) property.

A reasonable belief exists if the facts and circumstances within the knowledge of a merchant, (*his*) (*her*) agent or employee and of which (*he*) (*she*) has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that merchandise has been or is about to be wrongfully taken.

Notes on Use

K.S.A. 21-5411(a) defines the crime of unlawful restraint. Subsection (b) provides that the statute does not apply to acts done in the performance of duty by a law enforcement officer. Subsection (c) sets forth the so-called merchant’s defense embodied in this instruction. In *Codner v. Skaggs Drug Centers, Inc.*, 224 Kan. 531, 533, 581 P.2d 387 (1978), it was held that the merchant’s defense is applicable in a civil action for false imprisonment. This has been the law in Kansas since the enactment in 1959 of an antecedent of K.S.A. 21-5411(c), which specifically provided the defense applied in actions for assault, false arrest, false imprisonment, unlawful detention, defamation or slander. Theft and unlawful deprivation of property are defined, respectively, in K.S.A. 21-5801 and 21-5803. The definition of reasonable belief is adapted from *State v. Abu-Isba*, 235 Kan. 851, 854, 685 P.2d 856 (1984).

Comment

The Supreme Court in *Alvarado v. City of Dodge City*, 238 Kan. 48, 708 P.2d 174 (1985) (an action in which the merchant was also a defendant), sets forth the history and social, economic and legal rationale of the merchant’s defense along with a review of the significant Kansas decisions discussing its application. In *Alvarado*, plaintiff was detained by an off-duty police officer working as a security guard for a discount store. The Supreme Court held: (1) plaintiff had no civil rights claim under 42 U.S.C. § 1983 because Kansas tort actions for false imprisonment, battery and defamation provide an adequate postdeprivation remedy sufficient to satisfy the requirements of due process under the Fourteenth Amendment; (2) the fact that the agent or employee who detains a suspected shoplifter is an off-duty law enforcement officer does not deprive the officer or his merchant employer of the merchant’s defense; (3) using the definitions of detention and arrest in K.S.A. 22-2202, the court held that although the officer told plaintiff he was

arresting her, displayed his badge and later filed an arrest report with the police department, plaintiff was only temporarily detained on the merchant's premises; and (4) the trial court erred in failing to give an instruction defining probable cause, one of the primary issues being whether the officer had probable cause to believe the defendant had wrongfully taken merchandise from the store.

127.24

COMPENSATORY DAMAGES

If you find for the plaintiff, you will then determine the amount of *(his)* *(her)* recovery. You should allow *(him)* *(her)* such amount of money as will reasonably compensate *(him)* *(her)* for the damage resulting from the wrongful conduct of the defendant. You may take into consideration any mental pain and suffering, fright, nervousness, indignity, humiliation, embarrassment, and insult to which *(he)* *(she)* was subjected, and from these as shown by the evidence you should award such sum as will fairly and adequately compensate *(him)* *(her)*. The amount to be awarded rests within your sound discretion.

The total amount of your verdict cannot exceed \$ _____, the amount of the plaintiff's claim.

Notes on Use

See PIK 4th 171.44, Punitive Damages, if punitive damages are involved and PIK 4th 103.05 for a definition of malice.

Comment

If exemplary damages are sought, proof of malice in making an arrest or in imposing restraint is competent. *Garnier v. Squires*, 62 Kan. 321, 62 P. 1005 (1900).

Evidence of wealth is competent on the question of punitive damages. *Hammargren v. Montgomery Ward & Co.*, 172 Kan. 484, 241 P.2d 1192 (1952).

The Supreme Court suggested that PIK 2d 14.22 [PIK 4th 127.24] be followed in an action for false imprisonment in *Munsell v. Ideal Food Stores*, 208 Kan. 909, 494 P.2d 1063 (1972).

C. MALICIOUS PROSECUTION

127.30

ELEMENTS OF ACTION

To maintain an action for malicious prosecution the plaintiff must prove that the defendant (*procured*) (*initiated*) (*continued*) the proceeding of which complaint is made, that the defendant in so doing acted without probable cause and with malice, and that the proceeding terminated in favor of the plaintiff.

Notes on Use

For malice defined, see PIK 4th 103.05.

For an explanation of procuring a proceeding, see Restatement (Second) of Torts § 674, comment b, and § 653, comment f.

Authority for this instruction may be found in *Lindenman v. Umscheid*, 255 Kan. 610, 624, 875 P.2d 964 (1994) (citing *Nelson v. Miller*, 227 Kan. 271, 276, 607 P.2d 438 (1980)). See also *Miskew v. Hess*, 21 Kan. App. 2d 927, 910 P.2d 223 (1996); *Knight v. Cordry*, 22 Kan. App. 2d 9, 913 P.2d 1206 (1995).

Comment

Both malice and want of probable cause must be proved. *Haines v. Atchison, T. & S. F. R. Co.*, 108 Kan. 360, 195 P. 592 (1921), *reh. denied* 108 Kan. 738, 196 P. 1079; *Messinger v. Fulton*, 173 Kan. 851, 252 P.2d 904 (1953).

For the elements of malicious prosecution, see *Messinger v. Fulton*, 173 Kan. 851, 252 P.2d 904; *Walker v. Smay*, 108 Kan. 496, 196 P. 231 (1921); *Thompson v. General Finance Co., Inc.*, 205 Kan. 76, 468 P.2d 269 (1970); and *Stohr v. Donahue*, 215 Kan. 528, 527 P.2d 983 (1974).

The discharge of an accused by an examining magistrate “should be regarded as tending to show want of probable cause, and, therefore, as being sufficient to place upon the defendant the burden of showing its existence.” *Tucker v. Bartlett*, 97 Kan. 163, 164, 155 P. 1 (1916). The burden of proving the want of probable cause, however, is upon the plaintiff who alleges it. *Eckl v. Brennan*, 150 Kan. 502, 504, 95 P.2d 535 (1939).

The finding of probable cause by a magistrate in a criminal felony proceeding is only prima facie evidence of probable cause. *Thompson v. General Finance Co., Inc.*, 205 Kan. 76, 468 P.2d 269 (1970). In an action for malicious prosecution based on the initiation of a proceeding, the inquiry as to want or existence of probable cause is limited to the facts and circumstances that were apparent at the time the proceeding was commenced. Facts learned at a preliminary trial may not be considered. *Atchison, T. & S. F. R. Co. v. Watson*, 37 Kan. 773, 15 P. 877 (1887); *Messinger v. Fulton*, 173 Kan. 851, 252 P.2d 904 (1953). However, if a person properly initiates a suit, that person could still be held liable for malicious prosecution for wrongfully continuing the suit if it becomes apparent that probable cause is lacking. *Miskew v. Hess*, 21 Kan. App. 2d 927, 933, 910 P.2d 223 (1996). See Restatement (Second) of Torts § 674, comment c.

The prosecution of a person by one with any other motive than to bring the guilty person to justice is malicious prosecution. Malice is not restricted to personal hatred, spite, or revenge. It is sufficient if the prosecution was instituted with any wrongful or improper motive. *Foltz v. Buck*, 89 Kan. 381, 385, 131 P. 587 (1913); *Blakely v. Roanoke State Bank*, 122 Kan. 810, 253 P. 544 (1927).

Damages may be recovered for the malicious prosecution of a civil suit. The action differs from an action for damages for abuse of process. *Ahring v. White*, 156 Kan. 60, 131 P.2d 699 (1942); *Jackson & Scherer, Inc. v. Washburn*, 209 Kan. 321, 496 P.2d 1358 (1972). Different elements enter into actions for malicious prosecution than enter into actions for false imprisonment. *Sharp v. Cox*, 158 Kan. 253, 146 P.2d 410 (1944).

Although in some particulars there may be distinctions between actions based upon malicious prosecution of civil actions and malicious prosecution of criminal actions, essentials of proof for recovery are the same. *Barnes v. Danner*, 169 Kan. 32, 216 P.2d 804 (1950). See also *Bratton v. Exchange State Bank*, 129 Kan. 82, 281 P. 857 (1929), citing authority to the effect that an action must have terminated in a plaintiff's favor and holding that the abandonment of a cause of action by filing an amended and supplemental petition arising out of the same subject matter is such a termination as will lay a foundation for an action of malicious prosecution.

For an action of malicious prosecution based upon lunacy and commitment proceedings, see *Eckl v. Brennan*, 150 Kan. 502, 95 P.2d 535 (1939); and *Dick v. Truck Insurance Exchange*, 386 F.2d 145 (10th Cir. 1967).

"In order to recover plaintiff must show that the defendant was responsible for the institution or continuance of the original proceeding of which complaint is made." *Barnes v. Danner*, 169 Kan. 32, 216 P.2d 804 (1950).

The substance of PIK 2d 14.30, 14.31, 14.32, 14.33 and 14.34 [PIK 4th 127.30, 127.31, 127.32, 127.33 and 127.34] were approved in *Silva v. Lewis*, 210 Kan. 348, 502 P.2d 831 (1972).

The substance of PIK 2d 14.30, 14.31, and 14.32 [PIK 4th 127.30, 127.31 and 127.32] were approved in *Thompson v. General Finance Co., Inc.*, 205 Kan. 76, 468 P.2d 269 (1970).

The liability of an attorney who initiates a civil proceeding on behalf of his client or who takes any steps in the proceeding without probable cause or for improper purposes is clearly enunciated in *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980).

An attorney cannot be held liable for the consequences of his professional negligence to his client's adversary. The remedy provided to a third-party adversary is solely through an action for malicious prosecution. *Id.*

In *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980), the court adopted the Restatement definition of favorable termination: "Civil proceedings may be terminated in favor of the person against whom they are brought by (1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his failure to prosecute them. A favorable adjudication may be by judgment rendered by a court after trial, or upon demurrer or its equivalent." 227 Kan. at 280, (citing Restatement Torts § 674, comment j).

A termination of a case based on a statute of limitations defense will not constitute a favorable termination for purposes of a malicious prosecution action. *Miskew v. Hess*, 21 Kan. App. 2d 927, 941, 910 P.2d 223 (1996).

In *Bergstrom v. Noah*, 266 Kan. 829, 974 P.2d 520 (1999), the court adopted the principle of Restatement (Second) of Torts § 675 (1977) that a lawyer who initiates an action "has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and ... (a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law." As stated in Comment d, he need not have the same degree of certainty as to the relevant facts that is required of a private prosecutor of criminal proceedings: "[I]t is enough if their existence is not certain but [the lawyer] believes he can establish their existence to the satisfaction of court and jury."

In *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 4 P.3d 1149 (2000), where plaintiff sought damages for malicious defense of an unemployment compensation claim, the Supreme Court, following the great weight of national authority, refused to recognize a new cause of action for malicious defense, citing *Baxter v. Brown*, 83 Kan. 302, 111 P. 430 (1910), which affirmed dismissal of a claim for maliciously filing an untrue verified answer in an action to recover on a note.

127.31

PROBABLE CAUSE—FACTS TO BE CONSIDERED

Probable cause for *(procuring) (initiating) (continuing)* a *(civil) (criminal)* proceeding exists when there are reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person to believe that the party committed the act of which complaint is made.

[In determining the issue of probable cause for *(procuring) (initiating)* a *(civil) (criminal)* proceeding, you should consider only the facts and circumstances that were apparent to insert name of defendant in this action at the time the original proceeding was *(procured) (initiated)*.]

[In determining the issue of probable cause for continuing a *(civil) (criminal)* proceeding, you should consider the facts and circumstances that became apparent to insert name of defendant in this action during the pendency of the original proceeding.]

Notes on Use

The first bracketed paragraph should be used when the allegation of malicious prosecution is based on either the procurement or initiation of the underlying proceeding. The second bracketed paragraph should be used when the allegation of malicious prosecution is based on the continuation of the underlying proceeding.

Comment

For authority, see *Barnes v. Danner*, 169 Kan. 32, 216 P.2d 804 (1950), holding that when facts are not in dispute the question of probable cause is for decision by the court, but when facts are in dispute the question is for the jury. See also *Messinger v. Fulton*, 173 Kan. 851, 252 P.2d 904 (1953); *Thompson v. General Finance Co., Inc.*, 205 Kan. 76, 468 P.2d 269 (1970); and *Stohr v. Donahue*, 215 Kan. 528, 527 P.2d 983 (1974).

See Comment to PIK 4th 127.33, Advice of an Attorney.

The definition of probable cause for instituting a civil proceeding set forth in PIK 2d 14.31 [PIK 4th 127.31] was adopted by the Supreme Court in *Hunt v. Dresie*, 241 Kan. 647, Syl. ¶ 5, 740 P.2d 1046 (1987).

“Where the facts are in dispute, the issue of probable cause is for the jury, but where there is no factual dispute it is a question of law for the court.” *Knight v. Cordry*, 22 Kan. App. 2d 9, 12, 913 P.2d 1206 (1995) (citing *Stohr v. Donahue*, 215 Kan. 528, 530, 527 P.2d 983 (1974)).

“Probable cause for instituting a proceeding exists when there is reasonable grounds for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the belief that the party committed the act of which he or she is complaining.” *Lindenman v. Umscheid*, 255 Kan. 610, 624, 875 P.2d 964 (1994); *Miskew v. Hess*, 21 Kan. App. 2d 927, 931, 910 P.2d 223 (1996). The mere fact criminal proceedings were terminated in plaintiff’s favor is not conclusive evidence the

proceedings were initiated without probable cause. *Daniels v. Dillard Dept. Stores, Inc.*, 881 F. Supp. 505 (D. Kan. 1995). If a person properly initiates a suit, that person still could be held liable for malicious prosecution for wrongfully continuing the suit when it becomes apparent that probable cause is lacking. *Miskew v. Hess*, 21 Kan. App. 2d 927, 933, 910 P.2d 223 (1996). See Restatement (Second) of Torts § 674, comment c.

127.32

WANT OF PROBABLE CAUSE—MALICE

Want of probable cause and malice should not be confused. There may be malice without probable cause and there may be probable cause without malice. You may not infer that a person who acted with malice acted either with or without probable cause, but you may infer that a person who acted without probable cause acted with malice. That is to say, want of probable cause may be evidence of malice, but malice is not evidence of either probable cause or the want of probable cause.

Comment

The rule is well settled that a jury may infer malice from want of probable cause. *Bratton v. Exchange State Bank*, 129 Kan. 82, 86, 281 P. 857 (1929). See also *Atchison, T. & S. F.R. Co. v. Watson*, 37 Kan. 773, 15 P. 877 (1887), and *Thompson v. General Finance Co., Inc.*, 205 Kan. 76, 468 P.2d 269 (1970).

“Malice is an essential element of an action for malicious prosecution but it is not restricted to the personal hatred, spite, or revenge of the one who institutes the prosecution. It is enough if the prior action was instituted for any improper or wrongful motive.... To subject a person to liability for wrongful use of civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based. Any other purpose constitutes malice, as that term is used in civil actions for malicious prosecution.” *Nelson v. Miller*, 227 Kan. 271, 278, 607 P.2d 438 (1980); *Miskew v. Hess*, 21 Kan. App. 2d 927, 936, 910 P.2d 223 (1996).

127.33

ADVICE OF AN ATTORNEY

The (*decision of a prosecuting attorney*) (*advice of an attorney sought and acted on in good faith*) as to the initiation of a (*criminal proceeding*) (*civil action*) is a complete defense for malicious prosecution, but this is so only when all facts known to the defendant, and all facts the defendant could have learned by diligent effort, have been fully and truthfully disclosed to the attorney.

Notes on Use

Good faith reliance on the advice of counsel rebuts the allegation of want of probable cause, and this is so whether the action is for malicious prosecution of a criminal charge or a civil action.

Comment

This defense has been recognized in Kansas at least since *Schippel v. Norton*, 38 Kan. 567, 16 P. 804 (1888). An extended recitation of the principles applicable in an action for malicious prosecution appears in *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980). The analysis of *Nelson* is repeated and applied in *Sampson v. Hunt*, 233 Kan. 572, 665 P.2d 743 (1983), and *Hunt v. Dresie*, 241 Kan. 647, 740 P.2d 1046 (1987).

The defense of reliance on the advice of counsel is available in an action for malicious prosecution of a civil suit to the same extent and upon the same principle as in an action based upon a criminal prosecution. *Carnegie v. Gage Furniture, Inc.*, 217 Kan. 564, 538 P.2d 659 (1975); *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980), Restatement of Torts (Second) § 675, comment g.

In *Hunt v. Dresie*, 241 Kan. 647, 659, 740 P.2d 1046 (1987), the elements of the defense of advice of counsel in a civil proceeding are set forth. The authority cited, 72 Am. Jur. 2d, Malicious Prosecution § 174, quotes the elements from an opinion in an action for a malicious criminal prosecution in which defendant claimed the defense of advice of private counsel. (*Monaghan v. Cox*, 155 Mass. 487, 489 30 N.E. 467, 468 (1892)).

When a malicious prosecution action is brought against an attorney, in determining probable cause the jury may properly consider not only those facts disclosed to the attorney by the client but also those which could have been learned by a diligent effort on the attorney's part. *Nelson v. Miller*, 227 Kan. 271, 284, 607 P.2d 438 (1980).

Under the rule stated in Restatement (Second) of Torts § 653, which imposes liability upon a private person who procures institution of criminal proceedings against another not guilty if done without probable cause and primarily for a purpose other than that of bringing an offender to justice, when a private person gives to a prosecuting attorney information that he believes to be true and the prosecuting attorney in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable even though the information proves to be false and his belief was one that a reasonable man would not entertain. Comment g. In *Hunt v. Dresie*, 241 Kan. 647, 658-59, 740 P.2d 1046 (1987), it was said the prosecuting attorney's responsibility completely supersedes that of the complainant in the ordinary case, since the prosecuting attorney alone is responsible for deciding whether criminal charges should be filed.

In *Bartal v. Brower*, 268 Kan. 195, 993 P.2d 629 (1999), a malicious prosecution action by a surgeon against plaintiffs and their attorneys in a malpractice action which had been voluntarily dismissed as to the surgeon prior to trial, summary judgment against the surgeon was affirmed, the court holding that plaintiffs reasonably relied upon advice of counsel in filing the malpractice claim against the surgeon, having disclosed to them all material facts, and their attorneys had sufficient information, based upon medical records and expert opinion, to determine probable cause, applying the standard set forth in *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980), to commence an action based upon lack of informed consent and medical negligence.

127.34

TERMINATION OF ACTION

In an action for malicious prosecution, the plaintiff need not prove that there was a trial upon the merits of the proceeding *(he)* *(she)* claims was maliciously prosecuted. To meet the requirement that a proceeding has been terminated in *(his)* *(her)* favor, the plaintiff may prove that it was dismissed, if it has not been commenced again.

Notes on Use

The trial court may desire to add the following sentence to the above instruction: “In this case the original action was terminated in favor of the plaintiff.”

Comment

A voluntary dismissal of the prior action without prejudice may be a termination in favor of the defendant in that action if the action is not commenced again. *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980).

127.35

ELEMENTS OF DAMAGES**Notes on Use**

It is the opinion of the Committee that the elements of compensatory damages are adequately covered in PIK 4th 127.24, Compensatory Damages, and that the elements of punitive damages are adequately covered in PIK 4th 171.44, Punitive Damages.

Comment

Counsel fees and other expenses incurred in defending a criminal action may be recovered. *Drumm v. Cessnum*, 61 Kan. 467, 59 P. 1078 (1900).

The measure of damages for injury to business or property is considered in *McGarr v. Schnoor Cigar Co.*, 125 Kan. 760, 266 P. 73 (1928).

Damages may be recovered for injuries to reputation and business. *Spencer v. Cramblett*, 56 Kan. 794, 44 P. 985 (1896).

D. FRAUD**127.40****FRAUD—ELEMENTS**

The essential elements required to sustain an action for fraud are:

- 1. That false or untrue representations were made as a statement of existing and material fact.**
- 2. That the representations were known to be false or untrue by the party making them, or were recklessly made without knowledge concerning them.**
- 3. That the representations were intentionally made for the purpose of inducing another party to act upon them.**
- 4. That the other party reasonably relied and acted upon the representations made.**
- 5. That the other party sustained damage by relying upon them.**

A representation is material when it relates to some matter that is so substantial as to influence the party to whom it was made.

Notes on Use

Burden of proof is by clear and convincing evidence. See PIK 4th 102.11.

Comment

Essential elements of fraud are stated in *Alires v. McGehee*, 277 Kan. 398, 85 P.3d 1191 (2004); *Sipes v. Crum*, 204 Kan. 591, 464 P.2d 1 (1970); and *Minnesota Ave., Inc. v. Automatic Packagers, Inc.*, 211 Kan. 461, 507 P.2d 268 (1973).

To constitute actionable fraud the representation must relate to past or present fact, as opposed to mere opinions or puffing or promised actions in the future. *Timi v. Prescott State Bank*, 220 Kan. 377, 553 P.2d 315 (1976). Actionable fraud may be based upon a suppression of facts that the party is under a legal or equitable obligation to communicate and in respect of which he could not be innocently silent. *DuShane v. Union Nat'l Bank*, 223 Kan. 755, 576 P.2d 674 (1978).

One of the essential elements of actionable fraud is reliance thereon by the party to whom the misrepresentation was made, to his detriment. *Nichols v. Kansas Political Action Committee*, 270 Kan. 37, 11 P.3d 1134 (2000); *Minnesota Ave., Inc. v. Automatic Packagers, Inc.*, 211 Kan. 461, 507 P.2d 268 (1973); *Wolf v. Brungardt*, 215 Kan. 272, 524 P.2d 726 (1974).

For a discussion of “silence” as fraud and accordingly the need to modify the instruction, see *Wolf v. Brungardt*, 215 Kan. 272, 524 P.2d 726 (1974).

Materiality of representation is defined in *Griffith v. Byers Construction Co.*, 212 Kan. 65, 510 P.2d 198 (1973), and *Timi v. Prescott State Bank*, 220 Kan. 377, 553 P.2d 315 (1976).

A plaintiff claiming to have a cause of action in fraud and conversion may have both theories submitted to the jury. *Patrons State Bank & Trust Co. v. Shapiro*, 215 Kan. 856, 528 P.2d 1198 (1974).

See also *Albers v. Nelson*, 248 Kan. 575, 579, 809 P.2d 1194 (1991).

127.41

FRAUD THROUGH SILENCE—ELEMENTS

The plaintiff claims fraud through silence on the part of the defendant. To constitute fraud by silence the plaintiff must prove:

- 1. The defendant has knowledge of material facts which plaintiff did not have and which the plaintiff could not have discovered by the exercise of reasonable diligence;**
- 2. The defendant was under an obligation to communicate the material facts to the plaintiff;**
- 3. The defendant intentionally failed to communicate to plaintiff the material facts;**
- 4. The plaintiff justifiably relied upon the defendant to communicate the material facts to the plaintiff; and**
- 5. The plaintiff sustained damages as a result of the defendant's failure to communicate this to the plaintiff.**

A fact is material if it is one to which a reasonable man would attach importance in determining *(his) (her)* choice of action in the transaction in question.

A party is justified in relying without investigation upon another to communicate the facts material to a transaction unless *(he) (she)* knows or has reason to know of facts which make *(his) (her)* reliance unreasonable.

Notes on Use

This instruction replaces PIK 4th 127.40, Fraud—Elements, where the claim of fraud is the result of silence rather than false representations.

Comment

Actionable fraud may be based upon a suppression of facts that the party is under a legal or equitable obligation to communicate and in respect of which he could not be innocently silent. *DuShane v. Union Nat'l Bank*, 223 Kan. 755, 576 P.2d 674 (1978).

A defrauded party would not be deprived of relief because he had the opportunity to investigate when his lack of knowledge was such that the investigation would disclose nothing to him. *Wolf v. Brungardt*, 215 Kan. 272, 524 P.2d 726 (1974).

The definition of justifiable reliance is quoted in *Goff v. American Savings Association*, 1 Kan. App. 2d 75, 82, 561 P.2d 897 (1977), from Restatement of Torts (Second) 540, page 10 (tent. draft no. 11, 1965). (Restatement [Second] of Torts [1976] states the rules on justifiable reliance in several separate sections: 537-545 and 547.)

The definition of a material fact is found in *Griffith v. Byers Construction Co.*, 212 Kan. 65, 73, 510 P.2d 198 (1973). See *City of Wichita, Kan. v. U.S. Gypsum Co.*, 72 F.3d 1491, 1495 (10th Cir. 1996) where the Tenth Circuit Court of Appeals reversed and remanded because the trial court specified to the jury what should be determined a “material fact.” In addition to the PIK 2d 14.42 [PIK 4th 127.41] definition of a material fact, the trial court also included an instruction stating the City had to prove that defendants concealed or misrepresented “material facts concerning unreasonable health hazards.” The City objected to this instruction and the Court of Appeals found that the district court had “invaded the province of the jury by pre-determining which fact a reasonable person could deem important.” *Id.*, 72 F.3d at 1495.

Jury instructions given by the trial court are approved if the instructions “properly and fairly state the law as applied to the facts in the case.” Modification of PIK 2d 14.42 [PIK 4th 127.41] (concerning when a party may justifiably rely without investigation upon another to communicate the facts material to a transaction) was proper when a contract between a buyer and a seller imposed on the buyer the duty to inspect and rely on his own inspection rather than on seller’s express or implied representations. *Boegel v. Colorado Nat’l Bank of Denver*, 18 Kan. App. 2d 546, 553, 857 P.2d 1362 (1993), *rev. denied* 253 Kan. 856 (1993) (citing *State v. Graham*, 244 Kan. 194, 206, 768 P.2d 259 (1989)).

127.42

FRAUD—PROMISE OF FUTURE EVENTS

The essential elements required to sustain an action for the fraudulent promise of future events are:

- 1. The promisor (*defendant*) had no intention of performing (*his*) (*her*) promise at the time (*he*) (*she*) made it;**
- 2. The promisor (*defendant*) did not perform (*his*) (*her*) promise as (*he*) (*she*) represented that (*he*) (*she*) would;**
- 3. The promisor (*defendant*) made the promise with the intent to deceive and for the purpose of inducing the plaintiff to act upon the promise;**
- 4. The plaintiff reasonably relied and acted upon the promise;**
- 5. The plaintiff sustained damages relying upon the promise of the promisor (*defendant*).**

Notes on Use

This instruction should only be given when the alleged fraud relates to promises or statements concerning future events.

Comment

This instruction is based on the theory that a person's intention or belief is a matter of fact, and that if a misrepresentation is made with regard thereto, the misrepresentation is one of fact. The gravamen in such a case is not the breach of the agreement to perform, but the fraudulent representation concerning a present, existing intention not to perform. *Edwards v. Phillips Petroleum Co.*, 187 Kan. 656, 360 P.2d 23 (1961).

If when the representations are made respecting what is to be done in the future there is no real intention on the part of the person making such a representation to do in the future the thing represented, the then existing false intention is sufficient to form the basis of liability for false representation. *Olsburg State Bank v. Anderson*, 154 Kan. 511, 119 P.2d 515 (1941).

A more effective way of enforcing a promise to perform some act in the future rather than on the "fraudulent promise" theory is by resort to the doctrine of promissory estoppel. See *Marker v. Preferred Fire Ins. Co.*, 211 Kan. 427, 506 P.2d 1163 (1973) and PIK 4th 124.13.

127.43

NEGLIGENT MISREPRESENTATION

One who, in the course of *[(his) (her)] [(business) (profession) (employment) (any transaction in which [he] [she] has a pecuniary interest)]*, supplies false information for the guidance of another person in such other person's business transactions, is liable for damages suffered by such other person caused by reasonable reliance upon the false information if:

1. The person supplying the false information failed to exercise reasonable care or competence in obtaining or communicating the false information; and,

2. The person who relies upon the information is *(the person or one of a group of persons for whose benefit and guidance the information is supplied) (a person or one of a group of persons to whom the person supplying the information knew the information would be communicated by another)*; and,

3. The damages are suffered in *(a transaction that the person supplying the information intends to influence or in a substantially similar transaction) (a transaction that the person supplying the information knew that another intended to influence)*.

Notes on Use

This instruction is applicable when there is no intent to deceive but only good faith coupled with negligence. The duty imposed is exercise of the care or competence of a reasonable man in obtaining or communicating the information. What is reasonable is, as in other cases of negligence, dependent upon the circumstances.

Alternatives respecting the person for or to whom the information is obtained or communicated are supplied in parentheses in paragraph 2 because liability attaches if the maker of the representation knows that his recipient intends to transmit the information to a similar person, persons or group. The second alternative in parentheses in paragraph 3 is applicable in combination with the second alternative in brackets in paragraph 2.

If there is a public duty to give the information, liability extends to loss suffered by any member of the class of persons for whose benefit the duty is created in any transaction in which it is intended to protect them.

Comment

In *Mahler v. Keenan Real Estate, Inc.*, 255 Kan. 593, 605, 876 P.2d 609 (1994), the court held that a cause of action for negligent misrepresentation as defined in Restatement (Second) of Torts § 552 (1976) is recognized in Kansas. This instruction is adapted from the Restatement. See the opinion in *Mahler* for a discussion of prior Kansas decisions upon which the court's holding is based.

In *FDX Supply Chain Services v. North Face, Inc.*, 98 F. Supp. 2d 1244 (D. Kan. 2000), this instruction was cited as defining the elements of negligent misrepresentation.

“The tort of negligent misrepresentation as set forth in Restatement (Second) of Torts § 552 (1976) does not, by its terms, apply to misrepresentations of an intention to perform an agreement. The tort only applies to cases of misrepresentation of factual, commercial information, not to statements of future intent.” *Bittel v. Farm Svcs. of Central Kansas, P.C.A.*, 265 Kan. 651, 962 P.2d 491 (1998). Whether misrepresentations are of present fact or of opinion or future intent is a question of law. *Id.* at 665.

In *Doss v. Manfredi*, 30 Kan. App. 2d 269, 40 P.3d 333 (2002), affirming summary judgment for defendant, the Court of Appeals held there was no cause of action for negligent evaluation of injuries received in an automobile collision against a chiropractor hired by a claims adjuster to review records of chiropractic treatment and determine whether they were related to plaintiff’s injuries received in the collision. On a theory of negligent misrepresentation, the chiropractor provided information to the insurance company and not the plaintiff and under Restatement (Second) of Torts § 552 was liable only to the insurance company for failure to exercise reasonable care.

E. DEFAMATION

127.50

COMMENT RESPECTING THE CONSTITUTIONAL REQUIREMENT OF ACTUAL MALICE IN DEFAMATION CASES IN KANSAS

When the action is one by a private person against a media defendant, Constitutional limitations come into play. In Kansas, these principles have been incorporated into the law of defamation generally, meaning that a private plaintiff may not recover punitive or presumed damages regardless of whether the defendant is a member of the media protected by the First Amendment. In the three *Gobin* decisions (*Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975), *appeal after remand* 229 Kan. 1, 620 P.2d 1163 (1980), *appeal after remand* 232 Kan. 1, 649 P.2d 1239 (1982) [*Gobin I*]; *Gobin v. Globe Publishing Co.*, 229 Kan. 1, 620 P.2d 1163 (1980) *appeal after remand* 232 Kan. 1, 649 P.2d 1239 (1982) [*Gobin II*]; *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239 (1982) [*Gobin III*]), the law of Kansas was reinterpreted in light of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), and other United States Supreme Court decisions. The change in the law is explained in *Gobin III*: “Prior to *Gertz*, Kansas followed the common-law rule dividing libel into libel per se and libel per quod. Libel per se involved words from which malice was implied and damage was conclusively presumed to result. General damages from such a publication arose by inference of law and the plaintiff was not obligated to establish damage by proof.... *Gertz*, as we pointed out in *Gobin I*, effected an immediate change upon the rule in Kansas and in those other states which presumed damages upon the establishment of libel per se, and permitted recovery based upon that presumption. Damages recoverable for defamation may no longer be presumed; they must be established by proof, no matter what the character of the libel.” 232 Kan. at 4-5. In a defamation action by a private person, punitive damages may not be recovered under any standard less demanding than actual malice as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

Gertz was an action by a private individual against a media defendant. The United States Supreme Court was balancing the interest of the states in compensating private individuals for wrongful injury to reputation against the need for “a vigorous and uninhibited press” protected by the First Amendment. A majority of state courts have held “where only a private plaintiff and non-media defendant are involved, the common law standard [of damages presumed upon establishment of libel per se and recovery of punitive damages] does not threaten the free and robust debate of public issues or a meaningful dialogue about self-government, or

freedom of the press,” and have refused “to extend the *Gertz* holding to actions between a private individual and a non-media defendant.” *Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108, 118 (Iowa 1984).

In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985), the court affirmed the interpretation of *Gertz* adopted by some state courts that where the defamed party is a private person and the action is against a non-media defendant, the legitimate state interest in compensation of individuals harmed by defamatory falsehood is not outweighed by the First Amendment values protected in *Sullivan* and *Gertz*. “In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’” (105 S. Ct. at 2946.)

“Lower federal courts and state courts have differed in their conclusions as to what level of fault must be shown by private plaintiffs after *Dun & Bradstreet*. The case has been cited for the proposition that a private figure plaintiff must prove at least negligence to recover any damages. Other courts have noted that, in view of the *Dun & Bradstreet* holding, it is questionable whether the fault requirement mandated by *Gertz* survives. Still other courts have concluded that the *Dun & Bradstreet* case left open the question whether strict liability was a constitutionally permissible standard in cases of private figures not involving issues of public concern.

“Finally, other courts have interpreted *Dun and Bradstreet* as indicating that the constitution thus imposes no minimum standard of fault in private plaintiff/private concern cases; states may choose whether to impose liability without fault in such cases. Under such an approach, the elimination of the fault requirement in cases involving private individuals and matters not of public concern was implied in *Dun & Bradstreet*, because the state interest in allowing presumed fault is of similar weight as the state interest in presumed damages.” 50 Am. Jur. 2d, Libel and Slander § 98.

In *Polson v. Davis*, 895 F.2d 705 (10th Cir. 1990), the court considered whether Kansas continues to recognize defamation per se, which does not require proof of actual damages. The court cited *Gobin III* and the statement quoted above that after *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), “Damages recoverable for defamation may no longer be presumed; they must be established by proof, no matter what the character.” It was noted that subsequent to *Gobin III*, the United States Supreme Court had limited *Gertz* to actions against media defendants and actions involving public issues on the basis that First Amendment freedoms were not at risk in actions by private individuals against non-media defendants, as discussed above. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985). Plaintiff argued that *Dun & Bradstreet* revealed *Gobin III* to be a needlessly overbroad reading of *Gertz*. The court declined to “correct” the law in Kansas, saying that *Dun & Bradstreet* was only permissive and did not require

as a constitutional matter a presumption of damages in defamation per se cases involving non-media defendants or issues not of public concern. The 10th Circuit Court of Appeals then states: “[T]he Kansas Supreme Court, although recognizing the opportunity in *Turner v. Halliburton Co.*, 240 Kan. 1, 722 P.2d 1106 (1986), has declined to reexamine the scope of its *Gobin* holding.” 895 F.2d at 708.

In point of fact, the court in *Turner* did not reconsider its holding in *Gobin III* because it found it unnecessary to do so in the circumstances and left the matter for later decision. After holding that the verdict for damages for defamation should be overturned because there was no credible evidence of actual malice to overcome a qualified privilege, the court said: “The judgment on the defamation issue must be reversed. In view of the decision reached upon this issue, it is not necessary for us to consider the question of whether *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239 (1982), requires actual proof of damage to reputation when the defendant is not a member of the news media. That question must be left for another day.” 240 Kan. at 11. While *Polson* affirmed the trial court’s refusal to instruct on defamation per se, the issue of whether the cause of action was recognized in Kansas was not foreclosed.

In *Zoeller v. American Family Mut. Ins. Co.*, 17 Kan. App. 2d 223, 834 P.2d 391 (1992), the Court of Appeals undertook to resolve finally the impact of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), upon the Kansas law of defamation. Where *Turner v. Halliburton Co.* left open the door on whether *Gobin III* should be read as authority that a private individual must prove actual damage to reputation in a defamation action against a non-media defendant, in *Zoeller v. American Family Ins. Co.* the court slammed the door in plaintiff’s face. Ruling precisely on the issue, the court of appeals concluded that the holding of *Gobin III* that damage to reputation was “an essential ingredient” of an action for defamation compelled the conclusion that Kansas no longer permits recovery based upon establishment of slander per se. The court notes *Dun & Bradstreet, Inc.*, and *Turner* and finds “tenuous” the conclusion in *Polson v. Davis*, 895 F.2d 705 (10th Cir. 1990), that the Kansas Supreme Court had declined in *Turner* to reconsider the scope of *Gobin III* in light of *Dun & Bradstreet, Inc.*, and agrees that, in dicta, the court in *Turner* seemed to open the door again on the issue of recognition of defamation per se. Nonetheless, the court found itself constrained by *Gobin III* and a later decision, *Knudsen v. Kansas Gas & Electric Co.*, 248 Kan. 469, 807 P.2d 71 (1991), which simply quotes *Gobin III* in a decision that turns upon plaintiff’s status as a limited public figure required to prove actual malice. (*Knudsen* cites *Dun & Bradstreet, Inc.* as permitting recovery of actual and punitive damages absent a showing of actual malice when the defamatory statements do not involve a matter of public concern.) The court states that if the question of the application of the rule of *Gobin III* to an action by a private individual against a non-media defendant has not in fact been answered, the Kansas Supreme Court would decide that Kansas no longer permits recovery based upon defamation per se. See *Ali v. Douglas Cable Communications*, 929 F. Supp. 1362, 1384 (D. Kan. 1996); *Pfannenstiel v. Osborne Publishing Co.*, 939 F. Supp. 1497, 1501 (D. Kan. 1996).

In *Moran v. State*, 267 Kan. 583, 985 P.2d 127 (1999), the court, without citing *Zoeller*, stated, “This court has not squarely decided whether in Kansas any and all defamation plaintiffs must allege and prove actual damages.” The court further stated, “*Gertz* changed the law in Kansas. Damages recoverable for defamation ... could no longer be presumed but must be proven,” which is the holding, without attribution, in *Gobin III*. It would appear that the question reserved in *Turner v. Halliburton Co.*, 240 Kan. 1, 722 P.2d 1106 (1986), whether actual damages to reputation must be proved in an action for defamation by a private citizen against a non-media defendant, has still not been answered.

Actual malice under the principle of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), is a different concept from the traditional concept of express malice as defined in PIK 4th 103.05. “The definition of the term ‘actual malice,’ when used as a constitutional requirement, has been criticized as illogical because the requirement has no connection with malice in its usual sense of ill will.” 50 Am. Jur. 2d, Libel and Slander § 4. Malice as defined in PIK 4th 103.05 was referred to by the United States Supreme Court in *Rosenbloom v. Metromedia*, 403 U.S. 29, 21 S. Ct. 1811, 29 L. Ed. 2d 296 (1971), as “common law malice.” Actual malice refers to a constitutional standard that is something other than malice in its usual sense of ill will. It is a term of art meaning knowledge of falsity or reckless disregard of truth or falsity.

The distinction between actual malice and common-law malice is noted in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510-11, 11 S. Ct. 2419, 115 L. Ed. 2d 447 (1991). “Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. See *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970). We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation.... But the term can confuse as well as enlighten. In this respect, the phrase may be an unfortunate one. See *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 666, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989). In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.”

127.51

DEFAMATION

Defamation is communication to a person of false information tending to (*expose another living person to public hatred, contempt or ridicule*) (*deprive another of the benefits of public confidence and social acceptance*) (*degrade and vilify the memory of one who is dead and to scandalize or provoke [his] [her] surviving relatives and friends*).

Notes on Use

This instruction has been modified to eliminate malice as an element of defamation. If the defendant asserts conditional privilege, malice is considered. See PIK 4th 127.53, Qualified or Conditional Privilege.

Comment

The definition of defamation in the instruction is drawn from the definition of criminal false communication in K.S.A. 21-6103 and based on a statement in *Jerald v. Houston*, 124 Kan. 657, 662, 261 P. 851 (1927), that whatever is punishable as libel may be the basis of a civil action of tort and that when taken over into the law of torts, the definition of the criminal statute is merely an authoritative statement of the meaning of the term libel. The criminal statute does not make a distinction between libel and slander. Such common law classification relates only to the manner in which the wrongful act is committed and appears to be unnecessary. The modern concept is that either conduct gives rise to an actionable claim termed defamation, and the same rules of law are applicable to each. *Luttrell v. United Telephone System, Inc.*, 9 Kan. App. 2d 620, 683 P.2d 1292 (1984), *aff'd* 236 Kan. 710, 695 P.2d 1279 (1985).

The instruction accords with Restatement (Second) of Torts § 559, comments b and c (1977).

In *Lindemuth v. Goodyear Tire & Rubber Co.*, 19 Kan. App. 2d 95, 103, 864 P.2d 744 (1993), the court cited PIK 2d 14.51 (1992 Supp.) [PIK 4th 127.51] with approval, noting that malice is not a necessary element of defamation unless it is first decided that such proof is required based upon the particular facts of the case.

“The elements of [defamation] include false and defamatory words (*Hein v. Lacy*, 228 Kan. 249, 616 P.2d 277 [1980]) communicated to a third person (*Schulze v. Coykendall*, 218 Kan. 653, 657, 545 P.2d 392 [1976]) which result in harm to the reputation of the person defamed. *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 6, 649 P.2d 1239 (1982) (*Gobin III*).” *Luttrell v. United Telephone System, Inc.*, 9 Kan. App. 2d 620 at 620-621, 683 P.2d 1292 (1985).

127.52

**NEGLIGENT DEFAMATION OF PRIVATE INDIVIDUAL
BY PUBLISHER OR BROADCASTER**

If you find the words claimed to have been published were defamatory under Instruction No. [PIK 4th 127.51], and that they were (*published*) (*broadcast*) concerning the plaintiff, you should then determine whether the defendant(s) (*was*) (*were*) negligent. If you find under all the facts and circumstances that defendant(s) (*was*) (*were*) negligent in (*publishing*) (*broadcasting*) the defamatory words and that the (*publication*) (*broadcast*) resulted in injury to plaintiff's reputation, you should award (*him*) (*her*) such amount as will compensate (*him*) (*her*) for the damages sustained.

A publisher or broadcaster is negligent when (*he*) (*she*) fails to observe that standard of care which would be observed by a reasonably careful publisher or broadcaster in the community or in similar communities under the existing circumstances.

Notes on Use

This instruction should be given in an action against a publisher or broadcaster when the plaintiff is a private individual and only actual damages from injury to reputation are sought.

Comment

A private individual (one not a public official or a public figure) may recover damages for defamation by a media defendant based upon negligent publication of the defamatory statement. *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 231-32, 531 P.2d 76 (1975). Recovery is limited, however, to actual damages. "[T]he private defamation plaintiff who establishes liability under a less demanding standard than the *New York Times* test [actual malice] may recover compensation only for actual injury.... [W]hen liability for defamation is based solely upon negligence the plaintiff may not recover presumed or punitive damages." *Id.* at 231, 233. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), held that a public official is prohibited from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Ruling on an issue of first impression in Kansas, the Court of Appeals in *Wright v. Bachmurski*, 29 Kan. App. 2d 595, 29 P.3d 979, *rev. denied* 272 Kan. 1423 (2001), held that each communication of a defamatory statement constitutes a new publication and gives rise to a separate cause of action against the publisher. Two individuals who made defamatory statements to a reporter for a newspaper that then published them were not joint tortfeasors with the newspaper and thus entitled to the benefit of a settlement release obtained by the newspaper.

127.53

QUALIFIED OR CONDITIONAL PRIVILEGE

A communication involving (*open violations of law which justify police interference*) (*matters in connection with inquiries regarding the commission of crime*) (*matters which are of legitimate public concern*) (*information concerning a public official*) (*matters involving employer-employee relations*) is qualifiedly privileged. When a communication is qualifiedly privileged, a plaintiff can only recover by proof of actual malice on the part of the defendant.

Proof of actual malice requires a plaintiff to prove that the (*communication*) (*publication*) was made with knowledge that the defamatory statement was false or with reckless disregard of whether it was false or not and that it was made with actual evil-mindedness or specific intent to injure.

In order for the plaintiff to recover (*he*) (*she*) must prove actual malice by the defendant and that it defamed the plaintiff.

[Where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which (*he*) (*she*) has a duty, and it is made to a person with a corresponding interest or duty, the communication constitutes a qualified privilege.]

Notes on Use

This instruction should be given when qualified or conditional privilege is asserted as a defense.

Comment

For a definition and explanation of conditional or qualified privilege, see *Knudsen v. Kansas Gas & Electric Co.*, 248 Kan. 469, 480, 807 P.2d 71 (1991).

Privileged communications are divided into two classes, namely: absolute and conditional or qualified. Absolutely privileged communications ordinarily pertain to officials engaged in some form of public service or to public figures. For a discussion of who is a public figure, see *Hanrahan v. Horn*, 232 Kan. 531, 657 P.2d 561 (1983), and *Steere v. Cupp*, 226 Kan. 566, 602 P.2d 1267 (1979). Where absolute privilege obtains, there is no liability and the court should take the case from the jury.

The question of the existence of a privilege is one of law to be determined by the court where the evidence is undisputed. *Faber v. Byrle*, 171 Kan. 38, 229 P.2d 718 (1951).

In *Stice v. Beacon Newspaper Corporation*, 185 Kan. 61, 65, 340 P.2d 396 (1964), it was said to be well settled that in this jurisdiction newspapers have a qualified privilege to publish as current news all matters involving open violations of the law which justify police interference, matters in connection with inquiries regarding the commission of a crime even though the publication may reflect on individuals concerned and bring them into public disgrace, and information concerning the conduct of a candidate for public office and the conduct of an incumbent public official. It was further held that a privilege rebuts the legal inference or presumption of malice which would otherwise arise as a matter of law and places upon

the plaintiff the burden to prove the statements were made with malice, actual evil-mindedness or specific intent to injure.

In *Munsell v. Ideal Food Stores*, 208 Kan. 909, 494 P.2d 1063 (1972), the court said that it was well recognized that a communication pertaining to the reasons for discharge of a former employee is qualifiedly privileged if made in good faith by a person having a duty in the premises to one who has a similar interest therein. The court further held that the express malice necessary to defeat a claim of qualified privilege was actual evil-mindedness or specific intent to injure, as set forth in *Stice v. Beacon Newspaper Corporation*, 185 Kan. 61, 340 P.2d 396 (1964).

See also PIK 4th 127.50, Comment Respecting the Constitutional Requirement of Actual Malice in Defamation Cases in Kansas.

Subsequent to the decision in *Munsell v. Ideal Food Stores*, 208 Kan. 909, 494 P.2d 1063 (1972), the requirement of proof for recovery in a defamation action by a public official (later expanded to include public figures) against a media defendant established in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), was incorporated into the Kansas law of conditional privilege. *New York Times v. Sullivan* requires the plaintiff to prove that the defamatory statement was made “with ‘actual malice’, that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” 376 U.S. at 279. In *Schulze v. Coykendall*, 218 Kan. 653, 661, 545 P.2d 392 (1976), the court adopted the principle that, “Proof of actual malice in defamation when a conditional privilege is found to exist requires a plaintiff to prove that the publication was made with knowledge that the defamatory statement was false or with reckless disregard of whether it was false or not.”

In *Hein v. Lacy*, 228 Kan. 249, 616 P.2d 277 (1980), the right of a public official to recover from a non-media defendant was explicitly measured by the actual malice standard of *New York Times v. Sullivan*.

For a discussion of the criteria for determining whether one charged with a crime is a limited public figure, giving rise to a qualified privilege, see *Ruebke v. Globe Communications Corp.*, 241 Kan. 595, 738 P.2d 1246 (1987).

In *Washington Post v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied* 385 U.S. 1011, 87 S. Ct. 708, 17 L. Ed. 2d 548 (1967), the court said of the decisions following *New York Times v. Sullivan* that:

“The obvious purpose of these cases is to create a rule of law more restrictive for public official plaintiffs than the pre-*Times* practice of allowing juries to infer malice from the face of defamatory publications.... Malice, under the pre-*Times* practice, was equated with hostility, vindictiveness or negligent disregard of reputation. Under the *Times* test false statements made with these motives alone are not actionable; maliciousness may be shown only through knowledge of falsity or reckless disregard of truth or falsity.”

New York Times v. Sullivan malice is a different standard of proof than evil-mindedness or intent to injure. In *Turner v. Halliburton*, 240 Kan. 1, 722 P.2d 1106 (1986), where the conditional privilege arose in circumstances of an inquiry from a prospective employer to a former employer, the court reversed a judgment for plaintiff on the ground the evidence failed to show evil-mindedness or specific intent to injure under the *Munsell* standard. The effect of *Turner* is to require proof of what is usually called common-law malice as well as *New York Times v. Sullivan* malice. It was argued in the dissent in *Turner* that more and different evidence than *New York Times v. Sullivan* malice was not required. In *El-Ghori v. Grimes*, 23 F. Supp. 2d 1259 (D. Kan. 1998), the court stated that actual malice is a term of art in a defamation claim meaning the false statement was made with knowledge that it was false or with reckless disregard of whether it was false or not and, as such, is not equivalent to bad will or ill motive ordinarily associated with malice. It was noted that in Kansas, under *Turner*, proof of both concepts is required where a qualified privilege applies. *Bosley v. Home Box Office, Inc.*, 59 F. Supp. 2d 1147 (D. Kan. 1999), notes the requirement to overcome a qualified privilege of proof of common-law malice as well as actual malice as defined in *New York Times v. Sullivan*, citing this instruction. In *Dominguez v. Davidson*, 266 Kan. 926, 974 P.2d 112 (1999), the court cited from *Turner* the dual standard of proof to overcome a qualified privilege.

K.S.A. 44-119a provides that an employer who discloses information about a current or former employee to a prospective employer shall be qualifiedly immune from civil liability and shall have absolute immunity for the disclosure of certain specified information.

127.54

DEFAMATION—PROOF OF DAMAGES

If you find that the communication was defamatory and the facts and circumstances surrounding the making of it resulted in injury and harm to the reputation of the plaintiff, then you should award plaintiff such amount that will compensate plaintiff for the damage the evidence shows plaintiff sustained.

Notes on Use

This instruction should be given when the plaintiff is a private individual and the defendant is a non-media defendant, *i.e.*, in a strictly private action for defamation. If the defendant is a publisher or broadcaster, see PIK 4th 127.52, Negligent Defamation of Private Individual By Publisher or Broadcaster.

Comment

In *Moran v. State*, 267 Kan. 583, 985 P.2d 127 (1999), the court notes that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), holds that “defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth [*i.e.*, who fail to prove actual malice as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)]” must be restricted to compensation for actual injury. According to *Gertz*, 418 U.S. at 349-350, “actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.”

127.55

TRUTH AS DEFENSE

It is a defense to a claim of defamation if the statement made was true.

Notes on Use

For authority, see *High v. Hardware Co.*, 115 Kan. 400, 223 P. 264 (1924), *Klover v. Rugh*, 99 Kan. 752, 162 P. 1179 (1917), and K.S.A. 21-4004.

Comment

“For there to be liability for defamation, there must be a publication of a matter that is both defamatory and false. In civil actions for libel where the defendant establishes the truth of the matter charged as defamatory, the defendant is justified in law and exempt from all civil responsibility. *Castle v. Houston*, 19 Kan. 417, Syl. 2 (1877).” *Ruebke v. Globe Communications Corp.*, 241 Kan. 595, 598, 738 P.2d 1246 (1987).

An action may lie for unwarranted invasion of right of privacy, even though the statement is true, unless the publication of the statement is made under such circumstances which would render it a privileged communication according to the law of libel and slander. See PIK 4th 127.61, Right of Privacy, and authorities in the Notes on Use.

127.56

APOLOGY OR RETRACTION

An apology or retraction is no defense to a claim of defamation, but it may be considered (*on the question of malice*) (*in mitigation of damages.*)

Comment

Evidence of apology or retraction may be received to show absence of malice or mitigation of damages. *Koontz v. Weide*, 111 Kan. 709, 208 P. 651 (1922); *Sweaney v. United Loan & Finance Co.*, 205 Kan. 66, 468 P.2d 124 (1970).

127.57

VOLUNTARY PUBLICATION

A person who voluntarily prepares a statement with a reasonable belief that it will be disclosed to others cannot recover.

Notes on Use

This instruction should be used where the asserted defense is that the defamatory statement was invited or procured by the plaintiff. For authority, see *Munsell v. Ideal Food Stores*, 208 Kan. 909, 494 P.2d 1063 (1972). See also *Richardson v. Gunby*, 88 Kan. 47, 127 P. 533 (1912), a case in which plaintiff instigated or procured a defamatory statement against himself for the purpose of predicated a suit for damages upon it.

F. RIGHT OF PRIVACY

127.61

RIGHT OF PRIVACY

The right of privacy is the right to be let alone.

In order to constitute an invasion of the right of privacy, the act must be of such a nature that would cause mental distress or injury to a person having ordinary feelings and intelligence.

The right of privacy is invaded if another:

[Intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or *(his)* *(her)* private affairs or concerns and if the intrusion would be highly offensive to an ordinary person;]

[Appropriates to *(his)* *(her)* own use or benefit the name or likeness of another;]

[Publicizes matters of a kind highly offensive to an ordinary man concerning the private life of another;]

[Publicizes matters which places another before the public in a false light of a kind highly offensive to an ordinary person.]

Notes on Use

The applicable bracketed phrase describing the nature of the invasion should be included in the instruction.

Comment

For authority, see *Munsell v. Ideal Food Stores*, 208 Kan. 909, 494 P.2d 1063 (1972), quoting from *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953). See also *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918), a case in which there was the exhibition in a moving-picture theater of the photograph of a person taken without her consent and for the purpose of exploiting the publisher's business, in which it was held there was a violation of the right of privacy.

Professor Prosser believed that the law of privacy comprises four distinct kinds of torts which are tied together by the common name, but otherwise have almost nothing in common except that each protects against interference with the right of the plaintiff to be left alone. See Prosser, *Law of Torts* (4th ed.) § 117. The Restatement (Second) of Torts, § 652, has adopted Professor Prosser's analysis of the right of privacy.

"Kansas was among the first states to recognize an action for invasion of privacy, in *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918). That was a case of 'appropriation of name or likeness' and would be classified today under the Restatement's § 652C. Since then we have recognized causes of action for 'intrusion upon seclusion' (652B) in *Froelich v. Adair*, supra [213 Kan. 357, 516 P.2d 993 (1973)], and

Dotson v. McLaughlin, *supra* [216 Kan. 201, 531 P.2d 1 (1975)]; for ‘appropriation of name or likeness’ (652C) in *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808; and for ‘publicity given to private life’ (652D) in *Munsell v. Ideal Food Stores*, 208 Kan. 909, 494 P.2d 1063. So far, it seems, all our cases which might have been categorized as ‘publicity placing person in false light’ under 652E have been cast by the parties in the more traditional molds of libel or slander.” *Rawlins v. Hutchinson Publishing Co.*, 218 Kan. 295, 543 P.2d 988 (1975).

Courts generally treat false light invasion of privacy claims and defamation claims in the same way, the difference between the two being the expanded publicity requirement in the former. To support a claim for defamation, communication of the allegedly false information to a single third person is sufficient publication. In a false light invasion of privacy claim, however, publication means that the matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032 (D. Kan. 1998); Restatement (Second) of Torts § 652D, comment a (1964).

The Supreme Court notes that the intrusion must be highly offensive to the ordinary man. *Froelich v. Werbin*, 219 Kan. 461, 548 P.2d 482 (1976).

See *Monroe v. Darr*, 221 Kan. 281, 559 P.2d 322 (1977), which was a cause of action for invasion of privacy by police officers by a physical intrusion upon the seclusion of a plaintiff where the Restatement (Second) of Torts, § 652B was followed.

In *Moore v. R.Z. Sims Chevrolet-Subaru, Inc.*, 241 Kan. 542, 738 P.2d 852 (1987), an invasion of privacy action arising from defendant’s efforts to repossess a truck plaintiff had purchased, the court approved PIK 2d 14.61 [antecedent of PIK 4th 127.61] as a correct statement of the law and further approved the following instruction which incorporates verbatim principles of law stated in *Dawson v. Associates Financial Services Co.*, 215 Kan. 814, 529 P.2d 104 (1974): “When one accepts credit he or she impliedly consents for the creditor to take reasonable steps to pursue payment and recovery of secured property. The right of a debtor to privacy is subject to the right of a creditor to take reasonable steps to collect the debt even though the creditor’s method may result in some actual, though not actionable, invasion of privacy. In order for an invasion of such right to be actionable, it must be of such manner and nature as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.”

127.62
CONSENT

In an action for invasion of the right of privacy, it is a defense that the individual consented to the act. Consent may be shown from *(his) (her)* conduct and the surrounding circumstances.

Comment

For authority, see *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953), involving trade publication of a photograph for which plaintiff voluntarily posed and did not suggest or prescribe any restrictions on its use.

127.63

DAMAGE ELEMENTS

If you find for the plaintiff, you will then determine the amount of *(his)* *(her)* recovery. You should allow *(him)* *(her)* such amount of money as will compensate *(him)* *(her)* for any mental suffering, shame or humiliation that resulted from the occurrence in question.

The amount of your verdict may not exceed \$_____, the amount of plaintiff's claim.

Comment

For authority, see *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953), in which it was declared, "As a general rule, recovery may be had without proof of special damage." See also *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918), to the same effect.

G. OUTRAGEOUS AND ABUSIVE CONDUCT

127.70

OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS

If a defendant intentionally or recklessly causes severe emotional distress to the plaintiff by extreme and outrageous conduct, then that defendant is liable to the plaintiff for the emotional distress; and, if the emotional distress causes bodily harm, then the defendant is liable for the bodily harm thus caused. To establish this cause of action a plaintiff must prove:

- 1. The defendant acted intentionally, or in reckless disregard of the plaintiff;**
- 2. the defendant's conduct was extreme and outrageous;**
- 3. the defendant's conduct caused the plaintiff's mental distress; and**
- 4. plaintiff's mental distress was extreme and severe.**

To find that the defendant's conduct was extreme and outrageous, you must find the defendant's conduct was so outrageous in character, and so extreme in degree that it goes beyond the bounds of decency. You must also find defendant's conduct was atrocious and utterly intolerable in a civilized community.

To find that the plaintiff's emotional distress was extreme and severe, you must find that the emotional distress suffered by the plaintiff was genuine and so severe, and to such an extreme degree, that no reasonable person should be expected to endure it.

Notes on Use

The trial court should give this instruction if the court has made the two threshold findings required by the cases ruling on this type of claim. *First*, the court must decide whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. *Second*, the court must determine whether the emotional distress suffered by the plaintiff is genuine and in such an extreme degree, the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it. *Roberts v. Saylor*, 230 Kan. 289, 292-93, 637 P.2d 1175 (1981).

In cases where bodily harm is claimed as a result of intentional infliction of emotional distress, the court must give the jury a specific question of whether the evidence has proved the emotional distress caused the claimed bodily injury.

Comment

Kansas courts first recognized this cause of action in *Dawson v. Associates Financial Services Co.*, 215 Kan. 814, 822, 529 P.2d 104 (1974), a case dealing with a debtor/creditor relationship. The wellspring for the ruling was Restatement (Second) of Torts § 46(1).

The four elements listed in the instruction can be found in *Roberts v. Saylor*, 230 Kan. at 292. See also *Taiwo v. Vu*, 249 Kan. 585, 592, 822 P.2d 1024 (1991). Those four elements were approved again in *Valadez v. Emmis Communications*, 290 Kan. 472, 229 P.3d 389 (2010).

The Restatement points out that it is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous that recovery is warranted. Where reasonable minds differ it is for the jury, subject to the control of the court, to determine whether the conduct has been extreme and outrageous. See Restatement (Second) of Torts § 46(1), comment h. Also, whether the evidence proves severe emotional distress is a question of law. Whether it in fact occurred is a jury question. See Restatement (Second) of Torts § 46(1), comments j and k. All reported cases after *Saylor v. Roberts* have ruled that those two threshold findings must be made by the court. It is for this reason that the Committee has placed the rule in the Notes on Use above.

When dealing with the concept of reckless conduct in this context, *Wiehe v. Kukal*, 225 Kan. 478, 592 P.2d 860 (1979), provides guidance. “. . . [R]ecklessness requires knowledge. The person who is reckless must have prior knowledge; he must know or have reason to know of facts which create a high degree of risk of harm to another, and then, indifferent to what harm may result, proceed to act.” 225 Kan. at 484.

Fright, concern, embarrassment, worry, and nervousness do not constitute sufficient harm to warrant the award of damages for a claim of outrage. *Dana v. Heartland Management Co., Inc.*, 48 Kan. App. 2d 1048, 301 P.3d 772 (2013).

127.71**EXTREME AND OUTRAGEOUS CONDUCT—DEFINED****Comment**

This instruction has been deleted because all concepts that were found here have been incorporated in PIK 4th 127.70, Outrageous Conduct Causing Severe Emotional Distress.

127.72

**OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL
DISTRESS TO THIRD PERSONS—IMMEDIATE FAMILY**

One who by extreme and outrageous conduct directed at an immediate member of the plaintiff's family intentionally or recklessly causes severe emotional distress to the plaintiff is subject to liability for such emotional distress, *[and, if bodily harm to the plaintiff results from it, for such bodily harm]*.

One claiming injuries for emotional distress must show:

- 1. That the defendant's conduct was extreme and outrageous;**
- 2. That the defendant's conduct was directed at a third person, other than the plaintiff;**
- 3. That the plaintiff is a member of the immediate family of that third person and was present; and**
- 4. That the plaintiff sustained severe emotional distress *[and bodily harm]* as a result of that conduct;**
- 5. That the defendant, by *(his) (her)* conduct, intentionally or recklessly caused severe emotional distress *[and bodily harm]* to the plaintiff.**

Notes on Use

This instruction should be used where the plaintiff claims that the outrageous conduct by the defendant was directed at a member of the immediate family in the presence of the plaintiff and, as a result of this conduct, plaintiff suffered severe emotional distress. It is not an essential element that plaintiff also suffered bodily harm. This would be additional damage if bodily harm was sustained.

Comment

In *Wiehe v. Kukal*, 225 Kan. 478, 592 P.2d 860 (1979), the court adopted § 46, subparagraph 2 of Restatement (Second) of Torts, which provides:

“Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm ... “

127.73

RECKLESSLY OR WITH INTENT—DEFINED

[Reckless conduct means a disregard or an indifference to the consequence of that conduct under circumstances involving danger to life or safety of others, although no harm was intended. A person who is reckless must know or have reason to know of facts which create a high degree of risk of harm to another, and then, indifferent to what harm may result, proceeds to act.]

[Intent to cause severe emotional distress exists when one engages in conduct with a desire to cause this distress in another person, or when *(he)* *(she)* knows *(his)* *(her)* conduct will cause that result.]

Notes on Use

The pertinent definition is to be used with PIK 4th 127.70, Outrageous Conduct Causing Severe Emotional Distress, depending on whether the claim is for intentional or reckless conduct.

Comment

The definitions are consistent with the Restatement, Torts 2d § 46(2)(a). *Wiehe v. Kukal*, 225 Kan. 478, 592 P.2d 860 (1979).

In *Summers v. Montgomery Elevator Co.*, 243 Kan. 393, 401, 757 P.2d 1255 (1988), the plaintiff requested the trial court to use PIK 2d 14.73 [PIK 4th 127.73] in instructing the jury. The Supreme Court held that there was insufficient evidence of willful and wanton conduct to support an instruction thereon.

127.80

ABUSE OF PROCESS

The essential elements required to sustain an action for abuse of process are:

- 1. That the defendant made an *(illegal) (improper) (unauthorized)* use of the process; and**
- 2. That the defendant had knowledge of the *(illegal) (improper) (unauthorized)* use of the process; and**
- 3. That it was done for the purpose of *(harassing) (causing great inconvenience) (causing great hardship)* to the plaintiff; and**
- 4. That the plaintiff sustained damage as a result.**

Notes on Use

This instruction is to be used when the plaintiff is claiming that the defendant used the process of the court, such as post-judgment executions, in an improper or illegal manner. The judgment may be valid but the process in enforcing it may not be.

Comment

In *Porter v. Stormont-Vail Hospital*, 228 Kan. 641, 621 P.2d 411 (1980), the court, in affirming a summary judgment, held the trial court had correctly stated the elements of abuse of process by quoting the following from 1 Am. Jur. 2d, Abuse of Process § 4:

“It is generally recognized that the elements essential to sustain the action are: (1) that the defendant made an illegal, improper, perverted use of the process [a use neither warranted nor authorized by the process], and (2) that the defendant had an ulterior motive or purpose in exercising such illegal, perverted, or improper use of process, and (3) that damage resulted to the plaintiff from the irregularity. While the existence of an ulterior motive may, perhaps, be inferred from the fact that process has been misused or misapplied, the reverse is not true, for if the act of the prosecutor is in itself regular, the motive, ulterior or otherwise, is immaterial.”

In the 1994 edition of Am. Jur. 2d, the statement of elements, substantially modified, appears at § 5.

127.90

PRIVATE NUISANCE—INTENTIONAL

The essential elements required to sustain an action for an intentional nuisance are:

- 1. The defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use;**
- 2. There was some interference with the use and enjoyment of the land of the kind intended;**
- 3. The interference that resulted, and the physical harm, if any, from that interference, were substantial; and**
- 4. The interference was of such a nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land.**

As used in this instruction, a defendant's interference with the use and enjoyment of another's land is intentional if the defendant (1) acts with the purpose of causing such interference, or (2) knows such interference is resulting or substantially certain to result from the defendant's conduct.

Notes on Use

Authority for this instruction can be found in *Williams v. Amoco Production Co.*, 241 Kan. 102, 734 P.2d 1113 (1987). See also *Culwell v. Abbott Construction Co.*, 211 Kan. 359, 506 P.2d 1191 (1973); *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, 628 P.2d 239, rev. denied 230 Kan. 819 (1981); and *United Proteins, Inc. v. Farmland Industries, Inc.*, 259 Kan. 725, 915 P.2d 80 (1996).

This instruction should be used when there is a claim of unlawful interference with a person's use or enjoyment of his or her land and such interference is claimed to be the result of intentional conduct of the defendant.

See PIK 4th 103.06, Nuisance Defined, and PIK 4th 126.65, Municipalities—Nuisance.

Comment

In *Culwell v. Abbott Construction Co.*, 211 Kan. 359, 506 P.2d 1191 (1973), the court discussed the differences between public and private nuisances. The Court also observed that "a nuisance may result from conduct which is intentional or negligent or conduct which falls within the principle of strict liability without fault." 211 Kan. at 364.

Where a nuisance has its origin in negligence, as distinguished from an absolute nuisance, contributory negligence is a defense. When tort liability is predicated on conduct less culpable than "intentional," the general rule is to compare fault and causation. *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, 628 P.2d 239, rev. denied 230 Kan. 819 (1981).

A nuisance action may be brought on the theory of strict liability or negligence; however, if the statute of limitations has run on the strict liability and negligence theories, a plaintiff may find relief under

the theory of intentional nuisance. See *Culwell v. Abbott Construction Co.*, 211 Kan. 359, 506 P.2d 1191 (1973) and *United Proteins, Inc. v. Farmland Industries, Inc.*, 259 Kan. 725, 915 P.2d 80.

On the issue of intent, “to create an ‘intentional’ nuisance, it is not enough to intend to create a condition causing harm; the defendant must either specifically intend to damage the plaintiff or act in such a way as to make it ‘substantially certain’ that damage will follow.” *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, 628 P.2d 239, *rev. denied* 230 Kan. 819 (1981). See also *Culwell v. Abbott Construction Co.*, 211 Kan. 359, 506 P.2d 1191 (1973); *United Proteins, Inc. v. Farmland Industries, Inc.*, 259 Kan. 725, 915 P.2d 80; and *Williams v. Amoco Production Co.*, 241 Kan. 102, 734 P.2d 1113 (1987).

The trial court did not err in failing to instruct on intentional nuisance where there was no evidence defendant intended for natural gas to leak from its wells into plaintiff’s irrigation water, nor was there any evidence that defendant intended this condition to continue once discovered. *Williams v. Amoco Production Co.*, 241 Kan. 102, 734 P.2d 1113 (1987).

128.01

DUTY OF MANUFACTURER AND SELLER

Negligence is the lack of ordinary care under the existing circumstances. As applied to the manufacture, distribution, and sale of a product, it means the failure of a manufacturer or seller to do something that a reasonably careful manufacturer or seller engaged in the same business would do, or the doing of something by a manufacturer or seller that a reasonably careful manufacturer or seller engaged in the same business would not do. The degree of care must be equal to the danger reasonably to be anticipated, measured by all the facts and circumstances.

Notes on Use

This instruction should be used in every products liability case where liability is predicated on negligence. Since the general duty of ordinary care includes the duties to design, inspect, test, and warn, this instruction should constitute the first paragraph of any instruction pertaining specifically to a particular duty.

Comment

The use of an earlier version of this instruction was approved in *Timsah v. General Motors Corp.*, 225 Kan. 305, 314, 591 P.2d 154 (1979). PIK 2d 13.01 [PIK 4th 128.01] is cited with approval as a general definition of negligence in *Beck v. Kansas Adult Authority*, 241 Kan. 13, 33, 735 P.2d 222 (1987).

The fact that a third party manufactures component parts does not affect the duty of the manufacturer of the finished product. Further, a repairer is subject to the same duties as a manufacturer. *Spencer v. Madsen*, 142 F.2d 820, (10th Cir. 1944). Under the Kansas Product Liability Act, K.S.A. 60-3301 *et seq.*, the term “manufacturer” is defined to include the manufacturer of component parts.

The doctrine of *res ipsa loquitur* may be invoked in an appropriate case where the liability of a manufacturer or seller is predicated on negligence. *Morrison v. Kansas City Coca-Cola Bottling Co.*, 175 Kan. 212, 263 P.2d 217 (1953); *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953) (holding that the doctrine extends to multiple defendants).

In order to recover in a products liability case, the defective product must be the actual and proximate cause of the injury. *Wilcheck v. Doonan Truck & Equipment, Inc.*, 220 Kan. 230, 552 P.2d 938 (1976). A manufacturer or seller of an article may be liable for property damage as well as for personal injury. *Spencer v. Madsen*, 142 F.2d 820 (10th Cir. 1944).

Emphasizing the distinction between tort and contract, Kansas has adopted the “economic loss rule” which states that a buyer of defective goods cannot sue in tort, either negligence or strict liability, when the only injury consists of damage to the goods themselves. The action must be brought in contract. *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 960 P.2d 255, *rev. denied* 265 Kan. 885 (1998).

128.02

DUTY AS TO PRODUCT DESIGN—MANUFACTURER AND SELLER

A (*manufacturer*) (*seller*) of a product has a duty to use ordinary care in the design of the product so that it will be reasonably safe for the use for which it is intended or which can reasonably be anticipated. In exercising this duty, ordinary care must be exercised by the (*manufacturer*) (*seller*) to design the product in such a way that the product is reasonably safe for the ordinary consumer who possesses knowledge common to the community as to the product's characteristics. Failure to fulfill this duty constitutes negligence.

[You may consider evidence of an alternative design in your determination of this issue, but it is not required to prove a design defect. Likewise, the fact that a hazard is open and obvious or has been warned against are also factors to be considered in analyzing whether a product is defective or dangerous.]

[If a product was at the time of manufacture in compliance with (*legislative regulatory standards*) (*administrative regulatory safety standards*) relating to design or performance, the product is not defective by reason of design or performance, unless the plaintiff proves that a reasonably prudent (*manufacturer*) (*seller*), could and would have taken additional precautions to design the product so as to be reasonably safe for the ordinary consumer who possesses knowledge common to the community as to the product's characteristics.]

[If the product was not at the time of manufacture in compliance with (*legislative regulatory standards*) (*administrative regulatory safety standards*) relating to design or performance, the product is defective unless the (*manufacturer*) (*seller*) proves that its failure to comply was a reasonably prudent course of conduct under the circumstances then existing. In this regard, a course of conduct is reasonably prudent if the product is designed to be reasonably safe for the ordinary consumer who possesses knowledge common to the community as to the product's characteristics.]

[If the product was at the time of manufacture in compliance with a mandatory government contract specification relating to design, the product is not defective for that reason.]

[If a product was not at the time of manufacture in compliance with a mandatory government contract specification relating to design, the product is defective for that reason.]

Notes on Use

This instruction should follow PIK 4th 128.01, Duty of Manufacturer and Seller, as a separate paragraph.

PIK 4th 128.02 follows K.S.A. 60-3304. The additional bracketed paragraphs may be used where required in a particular case.

Comment

A manufacturer has the duty to use reasonable care in the design of his products so that they will be reasonably safe for their intended use, including any emergency uses which can be reasonably anticipated. *Garst v. General Motors Corporation*, 207 Kan. 2, 484 P.2d 47 (1971). See also *Stevens v. Allis-Chalmers Mfg. Co.*, 151 Kan. 638, 100 P.2d 723 (1940).

The *Garst* opinion suggests several factors to be considered in determining whether or not the manufacturer has exercised due care in the design of its products. These include:

1. Whether others in the field are using the same design or a safer design.
2. Whether a safer design not yet in use is known to be feasible.
3. Whether in the case of a new product there has been adequate testing.

The fact that the manufacturer has conformed to the practice of other manufacturers in the field is not conclusive of ordinary care but only evidence of ordinary care. Compliance with a legislatively or administratively enacted standard is, however, prima facie evidence of due care and that a conforming product is not defective. *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976). The presumption created is rebuttable by a preponderance of the evidence that a reasonably prudent product seller would and could have taken additional precautions. *Miller v. Lee Apparel Co.*, 19 Kan. App. 2d 1015, 881 P.2d 576 (1994); *Pfeiffer v. Eagle Mfg. Co.*, 771 F. Supp. 1133 (D. Kan. 1991). There is no distinction between design, performance, warnings and instructions as it relates to duty of a seller beyond administrative and legislative standards. *Alvarado v. J.C. Penney Co. Inc.*, 735 F. Supp. 371 (D. Kan. 1990).

In *Prentice v. Acme Machine & Supply Co.*, 226 Kan. 406, 601 P.2d 1093 (1979), the use of the original PIK 13.02 [antecedent of PIK 4th 128.02] was held improper in an action where a plaintiff's claim was based solely on the theory of strict liability and not on the theory of negligence.

Emphasizing the distinction between tort and contract, Kansas has adopted the “economic loss rule” which states that a buyer of defective goods cannot sue in tort, either negligence or strict liability, when the only injury consists of damage to the goods themselves. The action must be brought in contract. *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 960 P.2d 255, rev. denied 265 Kan. 885 (1998).

The Supreme Court in *Delaney v. Deere and Co.*, 268 Kan. 769, 999 P.2d 930 (2000), held that K.S.A. 60-3305(c) only applies to claims based upon an insufficient warning. It does not limit recovery for a claim based upon a defective design or dangerous product. *Delaney* summarizes Kansas law regarding design defects in a product:

“[W]hether a design defect in a product exists is determined using the consumer expectations test. A plaintiff must show that the product is both in a defective condition and dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics. See *Lester*, 230 Kan. at 649-654, 641 P.2d 353 [*Lester v. Magic Chef*, 230 Kan. 643, 641 P.2d 353 (1982)]. *Betts*, 236 Kan. at 115-16, 689 P.2d 795 [*Betts v. General Motors Corp.*, 236 Kan. 108, 115, 689 P.2d 795 (1984)]. Evidence of a reasonable alternative design may be introduced but is not required. *Siruta*, 232 Kan. at 667-68, 659 P.2d 799 [*Siruta v. Hesston Corp.*, 232 Kan. 654, 659 P.2d 799 (1998)]; *Jenkins*, 256 Kan. at 636, 886 P.2d 869 [*Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 630, 886 P.2d 869 (1994)]. The fact that a hazard is open and obvious or has been

warned against are factors to be considered in analyzing whether a product is defective or unreasonably dangerous. The ultimate determination remains whether the product is defective and dangerous beyond a reasonable consumer's expectations." *Delaney*, 268 Kan. at 792-93.

128.03

DUTY TO INSPECT**A. Manufacturer**

The manufacturer of a product has a duty to make a reasonable inspection of the manufactured product for any defect. Failure to do so constitutes negligence.

B. Seller

The seller of a product, although manufactured by another, has a duty to make a reasonable inspection of the product for any defect. What constitutes a reasonable inspection depends upon the nature of the product and all the circumstances. Failure to make such an inspection constitutes negligence. (Include here a description of the product and a more particular statement of the duty as set forth in the comment.)

Notes on Use

A or B should be used as appropriate and should follow PIK 4th 128.01, Duty of Manufacturer and Seller, as a separate paragraph.

Comment

Ordinary care requires the manufacturer and seller to make a reasonable inspection. *Coleman Co. v. Gray*, 192 F.2d 265 (10th Cir. 1951) *cert. denied* 342 U.S. 943, 72 S. Ct. 554, 96 L. Ed. 701 (1952) (manufacturer of pressing iron); *Morrison v. Kansas City Coca-Cola Bottling Co.*, 175 Kan. 212, 263 P.2d 217 (1953) (bottler of beverage); *Kitchener v. Williams*, 171 Kan. 540, 236 P.2d 64 (1951) (seller of hot-water heater).

A manufacturer's duty to inspect extends to products manufactured by another which are component parts of the product produced by the manufacturer. *Rauch v. American Radiator & Standard Sanitary Corp.*, 252 Iowa 1, 104 N.W.2d 607 (1960) (manufacturer of a hot-water heater).

Under most circumstances the seller's duty to inspect is considerably more limited than that of the manufacturer. The seller's duty of inspection depends on the type of product involved in a particular case. In some cases the nature of the product being sold obviates the need for inspection. Thus the instruction must be adapted to specific cases. Consider the following rules:

- (1) In the sale in a sealed package or closed container of a product manufactured by another, the seller has no duty to open the package or container and inspect the contents unless the condition of the package or container is such as to indicate to the ordinary person the possibility of a defect in or a danger from the contents.
- (2) In the sale of a bottled product manufactured by another in a container, the seller has a duty to make a reasonable inspection of the container itself for defects therein.
- (3) In the sale of new and used automobiles, a dealer has a duty to make reasonable tests for defects which would render the vehicle unsafe for use.

A seller ordinarily is not obligated to inspect a product for latent defects. *Nelson v. Healey*, 151 Kan. 512, 99 P.2d 795 (1940). A seller may not, however, avoid liability by deliberately remaining uninformed about a product. *Cunningham v. Subaru of America, Inc.*, 684 F. Supp. 1567 (D. Kan. 1988).

Emphasizing the distinction between tort and contract, Kansas has adopted the “economic loss rule” which states that a buyer of defective goods cannot sue in tort, either negligence or strict liability, when the only injury consists of damage to the goods themselves. The action must be brought in contract. *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 960 P.2d 255, *rev. denied* 265 Kan. 885 (1998).

128.04

DUTY TO TEST**A. Manufacturer**

The manufacturer of a product has a duty to make such tests for defects as are reasonably necessary to assure safety of the product manufactured. Failure to do so constitutes negligence.

B. Seller

The seller of a product, although manufactured by another, as a part of *(his) (her)* duty of ordinary care, has a duty to make such tests for defects as are reasonably necessary to assure safety of the products sold. Failure to make such tests constitutes negligence.

Notes on Use

A or B should be used as appropriate and should follow PIK 4th 128.01, Duty of Manufacturer and Seller, as a separate paragraph.

Comment

A manufacturer's duty to test a product is recognized in *Spencer v. Madsen*, 142 F.2d 820 (10th Cir. 1944), and *Lindquist v. Ayerst Laboratories, Inc.*, 227 Kan. 308, 319, 320, 607 P.2d 1339 (1980). This duty extends to component parts manufactured by another.

While the law recognizes a testing obligation on the part of a seller in a few instances, the duty is greatly limited in most cases. The seller's duty of inspection depends on the type of product involved in a particular case. The nature of the product involved may obviate the need for inspection. Thus the instruction must be adapted to particular cases. Consider the following rules:

(1) In the sale of a product manufactured by another in a sealed package or closed container, a seller has no duty to open the package or container and test the contents thereof.

(2) A seller of food in other than sealed containers has a duty to test for impurities and contamination that would be discoverable by any usual and ordinary test.

(3) In the sale of new and used automobiles, a dealer has a duty to make reasonable tests for defects which would render the vehicle unsafe for use.

A seller has no duty to test for latent defects in a product, at least where he has obtained the product from a reputable manufacturer and there is nothing to indicate to him any special need for testing. In *Cunningham v. Subaru of America, Inc.*, 684 F. Supp. 1567 (D. Kan. 1988), it is held that a seller cannot avoid liability for selling defective products by deliberately engaging in an attempt to be uninformed about the product's attributes or characteristics.

Under *Summers v. Montgomery Elevator Co.*, 243 Kan. 393, 757 P.2d 1255 (1988), this instruction was properly denied when there were no allegations in the pleading or pretrial order which would support a claim for liability for an inherent defect or the sale of a defective product.

Emphasizing the distinction between tort and contract, Kansas has adopted the “economic loss rule” which states that a buyer of defective goods cannot sue in tort, either negligence or strict liability, when the only injury consists of damage to the goods themselves. The action must be brought in contract. *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 960 P.2d 255, *rev. denied* 265 Kan. 885 (1998).

128.05

DUTY TO WARN—MANUFACTURER AND SELLER

A (*manufacturer*) (*seller*) of a product which (*he*) (*she*) (*it*) knows, or by the exercise of ordinary care should know, is potentially dangerous to users thereof, has a duty to give adequate warnings of such danger where injury to a user thereof can be reasonably anticipated if an adequate warning is not given. The duty to warn includes a duty to provide a warning to dangers inherent in use and the duty to provide adequate instructions for safe use. Failure to so warn constitutes negligence.

[If the warning on the product was, at the time of manufacture, in compliance with (*legislative regulatory standards*) (*administrative regulatory safety standards*) relating to warnings or instructions, the product is not defective by reason of the warning or instructions, unless the plaintiff proves that a reasonably prudent (*manufacturer*) (*seller*) could and would have taken additional precautions.]

[If the warning on the product was not, at the time of manufacture, in compliance with (*legislative regulatory standards*) (*administrative regulatory safety standards*) relating to warnings or instructions, the product is defective unless the (*manufacturer*) (*seller*) proves that its failure to comply was a reasonably prudent course of conduct under the circumstances.]

[If the warning on the product was, at the time of manufacture, in compliance with a mandatory government contract specification relating to warnings or instructions, then the product is not defective for that reason.]

[If the warning on the product was not, at the time of manufacture, in compliance with a mandatory government contract specification relating to warnings or instructions, the product is defective for that reason.]

[You are further instructed that any duty to warn against a danger or hazard does not extend:

A. To warnings, protecting against or instructing with regard to those safeguards, precautions, and actions which a reasonable user or consumer of the product, with the training, experience, education, and with any special knowledge the user or consumer did, should or was required to possess, could and should have taken for such user or consumer or others, under all the facts and circumstances;

B. To situations where the safeguards, precautions, and actions would or should have been taken by a reasonable user or consumer of the product similarly situated exercising reasonable care, caution, and procedure;

C. To warnings, protecting against or instructing with regard to dangers, hazards, or risks which are patent, open, or obvious and which should have been realized by a reasonable user or consumer of the product].

Notes on Use

This instruction should follow PIK 4th 128.01, Duty of Manufacturer and Seller, if the claim of negligence is based upon a breach of a duty to warn.

Bracketed paragraphs are derived from K.S.A. 60-3304 and K.S.A. 60-3305 of the Kansas Product Liability Act, and may be used in a particular case if appropriate under the evidence.

Comment

In *Younger v. Dow Corning Corporation*, 202 Kan. 674, 451 P.2d 177 (1969), the court held that the manufacturer of a product who gave adequate warning of a potential hazard to an immediate vendee, an industrial user, had no additional duty to warn the vendee's employee. It was emphasized that the product, a chemical compound used in an industrial process, was not a highly dangerous explosive or poisonous product. The manufacturer had the right to anticipate that the employer would pass on the warning to its employees.

An extensive discussion of duties of manufacturers and sellers is found in *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976). The court, in a case involving an LP gas explosion, stated that a seller has a duty to warn concerning a dangerous product when he knows, or has reason to know, the product is, or is likely to be, dangerous for the use for which it is supplied. On the other hand, the manufacturer of LP gas fulfilled its duty to the ultimate consumer when it added a distinctive odor to the gas and ascertained the distributor was adequately trained and familiar with the properties of the gas and safe methods of handling it and was capable of passing this knowledge on to customers. The distributor had a duty to warn, but only to the extent of dangers not known to the consumer.

The duty of a seller of a heating unit to give complete instructions as to its use was recognized in *House v. Wichita Gas Co.*, 137 Kan. 332, 20 P.2d 479 (1933). In *Alexander v. Inland Steel Co.*, 263 F.2d 314 (8th Cir. 1958), the court said that the Kansas and Missouri law on the duty to warn was the same, and that while a manufacturer was obligated to give warning if an article he manufactured was dangerous because of its intended use, still recovery would be denied where a failure to warn was not the proximate cause of the injury.

K.S.A. 60-3304 concerns situations where there is some legislative or administrative regulatory safety standard relating to design, performance, warning, or instructions. See the comments to PIK 4th 128.02, Duty as to Product Design—Manufacturer and Seller, as to legislative and administrative standards.

K.S.A. 60-3305 limits the duty to warn to a "reasonable user or consumer" standard. See *Miller v. Lee Apparel Co.*, 19 Kan. App. 2d 1015, 881 P.2d 576 (1994).

There is no duty under K.S.A. 60-3305 for a manufacturer or seller of a product to warn members of a profession against dangers generally known to that trade or profession. *Mays v. Ciba-Geigy Corp.*, 233 Kan. 38, 60, 661 P.2d 348 (1983); *Kearney v. Kansas Public Service Co.*, 233 Kan. 492, 496-497, 665 P.2d 757 (1983).

The manufacturer of prescription drugs has a duty to warn the medical profession of dangerous side effects of its products of which it knows, has reason to know, or should know, based upon its position as an expert in the field and upon its research and publications in the field. *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 409, 681 P.2d 1038, *cert. denied* [*Ortho Pharmaceutical Corp. v. Wooderson*] 469

U.S. 965, 105 S. Ct. 365, 83 L. Ed. 2d 301 (1984) (holding failure to warn was not the cause in fact of injury).

Under *Summers v. Montgomery Elevator Co.*, 243 Kan. 393, 757 P.2d 1255 (1988), this instruction was properly denied when there were no allegations in the pleading or pretrial order which would support a claim for liability for an inherent defect or the sale of a defective product. In *Prentice v. Acme Machine & Supply Co.*, 226 Kan. 406, 408, 601 P.2d 1093 (1979), it was held to be error to give the original PIK 13.05 [antecedent of PIK 4th 128.02] when the plaintiff's claim was based solely upon a theory of strict liability and not on the theory of negligence.

In *Nichols v. Central Merchandise, Inc.*, 16 Kan. App. 2d 65, 817 P.2d 1131 (1991), the court followed the doctrine of "learned intermediary" expressed in *Humes v. Clinton*, 246 Kan. 590, 792 P.2d 1032 (1990), that shields a manufacturer of prescription drugs from a claim of failure to warn of dangerous side effects. The *Nichols* court applied this doctrine under the facts of the case to likewise shield a pharmacist.

For a discussion of the post-sale duty to warn see *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 861 P.2d 1299 (1993).

Emphasizing the distinction between tort and contract, Kansas has adopted the "economic loss rule" which states that a buyer of defective goods cannot sue in tort, either negligence or strict liability, when the only injury consists of damage to the goods themselves. The action must be brought in contract. *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 960 P.2d 255, *rev. denied* 265 Kan. 885 (1998).

The Supreme Court in *Delaney v. Deere and Co.*, 268 Kan. 769, 999 P.2d 930 (2000), held that K.S.A. 60-3305(c) only applies to claims based upon an insufficient warning. It does not limit recovery for a claim based upon a defective design or dangerous product. The *Delaney* court goes on to say that the duty to warn generally encompasses two separate duties: the duty to provide a warning to dangers inherent in use and the duty to provide adequate instructions for safe use.

128.06

DUTY OF BUYER OR CONSUMER

A (buyer) (consumer) has a duty to use ordinary care for (his) (her) own safety and protection. (He) (She) must exercise ordinary care with reference to those obvious defects and dangerous conditions about which (he) (she) knows and understands or about which (he) (she) should know and understand. (He) (She) also has a duty to use a product in accordance with adequate instructions and warnings, and to use the product in a normal manner. Failure to fulfill any of these duties constitutes negligence on the part of the (buyer) (consumer) which you may consider in determining the comparative fault of the parties.

Notes on Use

The instruction is applicable only in those cases where liability is predicated on negligence and the defendant contends that the buyer or consumer failed to observe defects or dangerous conditions, failed to use the product according to the manufacturer's direction and warning, or used the product in an abnormal manner.

Comment

The rules of comparative fault apply when liability is predicated on negligence. See *Glenn v. Fleming*, 240 Kan. 724, 732 P.2d 750 (1987); *Teepak, Inc. v. Learned*, 237 Kan. 320, 699 P.2d 35 (1985); *Negley v. Massey Ferguson, Inc.*, 229 Kan. 465, 625 P.2d 472 (1981); *Kennedy v. City of Sawyer*, 228 Kan. 439, 449, 450, 618 P.2d 788 (1980); *Langhofer v. Reiss*, 5 Kan. App. 2d 573, 620 P.2d 1173 (1980); *Brown v. Keill*, 224 Kan. 195, 205, 580 P.2d 867 (1978); Kelly, *Comparative Negligence—Kansas*, 43 J.B.A.K. 151 (1974); and PIK 4th Chapter 105.00, Comparative Fault.

Kerns v. G.A.C., Inc., 255 Kan. 264, 875 P.2d 949 (1994), states that dangers or hazards that are open and obvious and which should be realized by a reasonable user do not impose a duty to warn. Note that *Kerns* did not have a claim for a defective or dangerous product. The Supreme Court in *Delaney v. Deere and Co.*, 268 Kan. 769, 999 P.2d 930 (2000), held that K.S.A. 60-3305(c) only applies to claims based upon an insufficient warning. It does not limit recovery for a claim based upon a defective design or dangerous product.

128.10

**IMPLIED WARRANTY OF FITNESS FOR
PARTICULAR PURPOSE**

When a seller at the time of contracting for a sale has reason to know of any particular purpose for which the (*products*) (*goods*) are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable (*products*) (*goods*), there is an implied warranty that the (*products*) (*goods*) shall be fit for that purpose.

A seller who breaches this warranty is liable to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured as a result.

Notes on Use

The first paragraph of the instruction is based on language found in K.S.A. 84-2-315.

The second paragraph of this instruction reflects the language contained in K.S.A. 84-2-318. This section provides as follows:

“A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.”

Comment

This instruction is necessary only where there is evidence of plaintiff's reliance on the seller's skill or knowledge and a showing of a particular, intended purpose which differs from an ordinary purpose. *Lindquist v. Ayerst Laboratories Inc.*, 227 Kan. 308, 320, 607 P.2d 1339 (1980).

In *Franklin v. Northwest Drilling Co.*, 215 Kan. 304, 524 P.2d 1194 (1974), the court held that there is an implied warranty that equipment furnished for a water well is fit for that purpose when seller knows the particular purpose for which the equipment is required and that the buyer relied on the seller's skill and judgment to select or furnish suitable equipment. The court further held that while the driller is bound by an implied warranty that the work be performed in a workmanlike manner, in absence of an expressed warranty, the driller is not bound by an implied warranty as to either quantity or quality of water. For implied warranty of workmanlike performance see also *Belger Cartage Serv., Inc. v. Holland Constr. Co.*, 224 Kan. 320, 333-34, 582 P.2d 1111 (1978); and *Global Tank Trailer Sales v. Textilana-Nease, Inc.*, 209 Kan. 314, 496 P.2d 1292 (1972).

The requirements of K.S.A. 84-2-316(2) relating to the exclusion or modification of an implied warranty of fitness for a particular purpose is discussed in depth in *Christopher & Son v. Kansas Paint & Color Co.*, 215 Kan. 185, 523 P.2d 709, *modified on rehearing* 215 Kan. 510, 525 P.2d 626 (1974). (Upon rehearing, the original opinion was modified to correct language in the opinion that an instruction on implied warranty of merchantability was improper.) In *Addis v. Bernardin, Inc.*, 226 Kan. 241, 597 P.2d 250 (1979), a seller's recommendation against the purchase of a product insisted upon by the buyer was

held insufficient to avoid liability for breach of implied warranty for a particular purpose, where the seller knew of, but failed to explain to buyer, the product's incompatibility with the product's intended use.

While implied warranties may be excluded under the UCC, a supplier in a consumer transaction may not exclude, modify or otherwise attempt to limit an implied warranty of fitness for a particular purpose under the Kansas Consumer Protection Act. See K.S.A. 50-639.

The UCC and the Kansas Consumer Protection Act, however, do not always control. *Corral v. Rollins Protective Services, Co.*, 240 Kan. 678, 732 P.2d 1260 (1987), should be considered. The court therein held that while the UCC only applies to sales it does not preclude the application of common law warranties to transactions which are not sales and clearly not controlled by the UCC. In *Farrell v. General Motors Corp.*, 249 Kan. 231, 240, 815 P.2d 538 (1991), the court held that while the consumer protection act prohibits limitations of UCC warranties, a supplier may make promises or common-law warranties, other than those implied by law as expressed in the UCC and may limit those promises. Note that K.S.A. 84-2a-101 *et seq.*, affords consumer leases protection under the UCC and Consumer Protection Code.

Kansas has recognized an implied warranty of fitness for new houses, but not for used houses, where the doctrine of caveat emptor still prevails. *Heinsohn v. Motley*, 13 Kan. App. 2d 66, 69, 70, 761 P.2d 796 (1988).

K.S.A. 84-2-318 provides that lack of privity is not a bar to recovery by a natural person who is personally injured by a breach of warranty. *Citizens State Bank v. Martin*, 227 Kan. 580, 589-90, 609 P.2d 670 (1980).

In *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 234 Kan. 742, 675 P.2d 887 (1984), the court held that implied warranties do not extend to a remote seller or manufacturer of an allegedly defective product, which is not inherently dangerous, for only economic loss suffered by a buyer who is not in contractual privity with the remote seller or manufacturer. See also *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 208, 209, 960 P.2d 255, *rev. denied* 265 Kan. 885 (1998).

Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980), holds that the doctrine of comparative fault applies to claims based on implied warranty. See also *Glenn v. Fleming*, 240 Kan. 724, 732 P.2d 750 (1987), and *Teepak, Inc. v. Learned*, 237 Kan. 320, 699 P.2d 35 (1985).

128.11

IMPLIED WARRANTY OF MERCHANTABILITY

A merchant impliedly warrants the merchantability of goods the merchant customarily sells. In order for goods to be merchantable they must:

(pass without objection in the trade under the contract description)

(in the case of fungible goods, be of fair average quality within the description)

(be fit for the ordinary purposes for which such goods are used)

(be of even run in quality and quantity within each unit and among all units involved)

(be adequately contained, packaged, and labeled)

(conform to the promises or affirmations of fact made on the container or label)

A seller who breaches this warranty is liable to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured as a result.

Notes on Use

This instruction is taken in substance from K.S.A. 84-2-314 of the Uniform Commercial Code. It also takes into account the amendment to K.S.A. 84-2-318 removing the privity requirements.

Only those paragraphs which are applicable in the case should be included in the instruction.

Comment

This instruction defines the minimum standards of quality which apply to sales by merchants. *Miller v. Lee Apparel Co.*, 19 Kan. App. 2d 1015, 881 P.2d 576 (1994), supports this instruction by holding that to establish a breach of implied warranty of merchantability, a buyer must show the goods were defective or unfit for the ordinary purposes for which such goods were sold.

Addis v. Bernardin, Inc., 226 Kan. 241, 245, 246, 597 P.2d 250 (1979), distinguishes between an implied warranty of merchantability and an implied warranty of fitness for a particular purpose. See also *Smith v. Stewart*, 233 Kan. 904, 667 P.2d 358 (1983).

The court in *Corral v. Rollins Protective Services, Co.*, 240 Kan. 678, 732 P.2d 1260 (1987), held that while the UCC only applies to sales it does not preclude the application of common-law warranties to transactions which are not sales and clearly not controlled by the UCC. In *Farrell v. General Motors Corp.*, 249 Kan. 231, 240, 815 P.2d 538 (1991), the court held that as the Consumer Protection Act only prohibits limitations of UCC warranties and not common-law warranties a supplier may make promises other than those implied by law, under the UCC, and may limit those promises.

Note that K.S.A. 84-2a-101 *et seq.* affords consumer leases protection under the UCC and Consumer Protection Code.

Absent privity, a corporate purchaser who has incurred only economic loss may not maintain a cause of action for breach of the implied warranty of merchantability against a manufacturer. *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 208, 209, 960 P.2d 255, *rev. denied* 265 Kan. 885 (1998).

128.12

**EXPRESS WARRANTIES BY AFFIRMATION,
PROMISE, DESCRIPTION, OR SAMPLE**

In the sale of goods, express warranties by a seller may be created in the following situation(s):

(Any representation of fact or promise that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the representation or promise.)

(Any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.)

(Any sample or model that is made part of the basis of the bargain creates an express warranty that the goods will conform to the sample or model.)

A statement pertaining to the value of the goods or purporting only to be a (seller's) (manufacturer's) opinion does not create a warranty.

A (seller) (manufacturer) who breaches an express warranty is liable to any injured person who may reasonably be expected to use, consume, or be affected by the goods.

Notes on Use

Only those paragraphs which are applicable in the case should be included in the instruction. For authority, see K.S.A. 84-2-313 and K.S.A. 84-2-318.

Comment

The rules as set forth in this instruction are recognized in *Cott v. Peppermint Twist Mgt. Co.*, 253 Kan. 452, 490, 491, 856 P.2d 906 (1993) (waitress' comments as to a drink); *Young & Cooper, Inc. v. Vestring*, 214 Kan. 311, 521 P.2d 281 (1974) (cattle infected with brucellosis); *Brunner v. Jensen*, 215 Kan. 416, 524 P.2d 1175 (1974) (bred cows); and *Huebert v. Federal Pacific Electric Co.*, 208 Kan. 720, 494 P.2d 1210 (1972) (electrical panel board and switch).

To extend a warranty to future performance, such warranty must be explicit. *Voth v. Chrysler Motor Corporation*, 218 Kan. 644, 545 P.2d 371 (1976).

A plaintiff need not prove the existence of a specific defect if it is shown that the product failed to perform as expressly warranted. *Cantrell v. R. D. Werner Co.*, 226 Kan. 681, 684, 685, 602 P.2d 1326 (1979); *Scheuler v. Aamco Transmissions, Inc.*, 1 Kan. App. 2d 525, 529, 571 P.2d 48 (1977).

This instruction may be modified making it applicable to an action between buyer and manufacturer or between buyer and seller and manufacturer and should be so done to avoid misleading the jury. *Cricket Alley Corp. v. Data Terminal Systems, Inc.*, 240 Kan. 661, 732 P.2d 719 (1987); *Black v. Don Schmid Motor, Inc.*, 232 Kan. 458, 657 P.2d 517 (1983).

The court in *Corral v. Rollins Protective Services, Inc.*, 240 Kan. 678, 732 P.2d 1260 (1987), held that while the UCC only applies to sales it does not preclude the application of common-law warranties to transactions which are not sales and clearly not controlled by the UCC. In *Farrell v. General Motors Corp.*, 249 Kan. 231, 240, 815 P.2d 538 (1991), the court held that as the Consumer Protection Act only prohibits limitations of UCC warranties and not common law warranties, a supplier may make promises other than those implied by law, under the UCC, and may limit those promises.

Note that K.S.A. 84-2a-101 *et seq.* affords consumer leases protection under the UCC and Consumer Protection Code. This instruction may be modified to include such leases.

128.13

MEASURE OF DAMAGES—WARRANTY CASES

The measure of damages for breach of an express or implied warranty is the difference between the value of the goods at the time of delivery and the value had they conformed to the warranty. Damages may not exceed the sum of \$ _____.

Notes on Use

This instruction should be used in those cases involving damages other than for personal injury. If other damages are claimed, such as for personal injury from use of the article, PIK 4th 171.02, Types of Damages Allowed—Personal Injury, should be used with or without the above instruction, depending upon the circumstances.

If consequential damages are claimed, PIK 4th 171.40, Measure of Damages—Personal or Property—Short Form, may be modified and added to the instruction.

Comment

For breach of warranty, liability is neither limited strictly to the purchase price paid nor to the difference between the value of the goods at the time of the delivery and the value had they conformed to the warranty.

Damages of the type that are the usual result of the breach of similar contracts may be recovered in a proper case. Unusual damages may be recovered only where the special circumstances giving rise to the unusual damages were reasonably within the contemplation of the contracting parties at the time of their transaction. *Steele v. J. I. Case Co.*, 197 Kan. 554, 419 P.2d 902 (1966); *Naaf v. Griffiths*, 201 Kan. 64, 439 P.2d 83 (1968).

In general, where an action is brought to recover damages resulting from a breach of warranty, the measure of damages, in the absence of evidence showing a greater damage, is the difference between the value of the property at the time of its delivery and the value it would have possessed had it conformed in fact to the warranty. *Lehigh, Inc. v. Stevens*, 205 Kan. 103, 468 P.2d 177 (1970).

The giving of this instruction was expressly approved by the court in *Brunner v. Jensen*, 215 Kan. 416, 524 P.2d 1175 (1974), a case involving the sale of a breeding herd of cattle. This instruction was given and approved in *Dold v. Sherow*, 220 Kan. 350, 552 P.2d 945 (1976).

The rule expressed by this instruction was held inapplicable by the court in *Ricklefs v. Clemens*, 216 Kan. 128, 531 P.2d 94 (1975). Plaintiff had purchased an automobile which neither he nor the seller knew was stolen. The seller did warrant the title to be valid. Upon being apprised the car was stolen, plaintiff brought an action for breach of warranty of title. He had, however, driven the car for nine months prior to obtaining knowledge of the title defect. Plaintiff contended the usual measure of damages for breach of warranty [PIK 4th 128.13] should apply. The court, however, held damages should be based upon the value of the automobile at the time the buyer's possession was disturbed, not the value of the automobile at the time it was delivered by the seller to the buyer.

K.S.A. 84-2-714(2) provides: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

The instruction uses the word “delivery” instead of “acceptance” because the word is more understandable to a jury and the time of delivery is ordinarily the time of acceptance. The term “acceptance” is a complex term defined in K.S.A. 84-2-606.

Emphasizing the distinction between tort and contract, Kansas has adopted the “economic loss rule” which states that a buyer of defective goods cannot sue in tort, either negligence or strict liability, when the only injury consists of damage to the goods themselves. The action must be brought in contract. *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 960 P.2d 255, *rev. denied* 265 Kan. 885 (1998).

128.14

**EXPRESS OR IMPLIED WARRANTY—UNREASONABLE
USE AS A DEFENSE—COMPARATIVE FAULT**

It is not a defense to an action for a breach of an express warranty that some independent force damaged or altered the product when the occurrence or effect of such independent force could have been reasonably foreseen by the *(seller) (manufacturer)*.

Notes on Use

This instruction should follow PIK 4th 128.12, Express Warranties by Affirmation, Promise, Description, or Sample, and be used where multiple causes are involved.

Comment

This instruction states the essence of the rule adopted in *Huebert v. Federal Pacific Electric Co.*, 208 Kan. 720, 494 P.2d 1210 (1972).

128.15

**IMPLIED WARRANTY OF FITNESS—FORESEEABILITY—
MULTIPLE CAUSES**

In order for a (*manufacturer*) (*seller*) of a product to be liable for breach of an implied warranty it must be shown that the product was defective in a way which breached the warranty at the time it left the hands of the (*manufacturer*) (*seller*). The (*manufacturer*) (*seller*) is liable if (*he*) (*she*) could reasonably foresee that the person injured would in normal circumstances be exposed to the product and that the defective condition in itself or in conjunction with a foreseeable independent force or event could result in injury to the person exposed.

Comment

Before liability can result from breach of an implied warranty there must be evidence from which an inference is permissible that the product was defective at the time it left the hands of the defendant. *Evangelist v. Bellern Research Corporation*, 199 Kan. 638, 433 P.2d 380 (1967); *Tilley v. International Harvester Co.*, 208 Kan. 75, 490 P.2d 392 (1971); *Farmers Ins. Co. v. Smith*, 219 Kan. 680, 549 P.2d 1026 (1976). The rule is applied as to carbonated beverage bottles in *Butterfield v. Pepsi-Cola Bottling Co.*, 210 Kan. 123, 499 P.2d 539 (1972).

See also *Lane v. Redman Mobile Homes, Inc.*, 5 Kan. App. 2d 729, 624 P.2d 984 (1981).

128.16

**EXPRESS OR IMPLIED WARRANTY—UNREASONABLE USE AS
A DEFENSE—COMPARATIVE FAULT**

It is a defense to an action for breach of an (*express*) (*implied*) warranty that the person injured discovered the defect in the product, became aware of the danger, and unreasonably continued to use the product.

Unreasonable use of the product may be considered in determining the comparative fault of the parties.

Notes on Use

For authority, see K.S.A. 60-258a and *Kennedy v. City of Sawyer*, 4 Kan. App. 2d 545, 608 P.2d 1379 (1980).

Comment

Unreasonable use of a product after a person discovers a defect and becomes aware of the danger of its continued use is a defense to an action for breach of warranty, express or implied. *Kennedy v. City of Sawyer*, 4 Kan. App. 2d 545, 556, 608 P.2d 1379, *reviewed* 228 Kan. 439, 450, 618 P.2d 788 (1980); *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104 (1976); *Bereman v. Burdolski*, 204 Kan. 162, 460 P.2d 567 (1969).

In *Kennedy*, the court defined the degree of unreasonable use of a product which would bar recovery on a claim of breach of implied warranty as the “unreasonable encounter with a known risk.” 4 Kan. App. 2d at 556.

128.17

**SPECIAL LIABILITY OF MANUFACTURER OR SELLER OF
PRODUCT TO USER OR CONSUMER—STRICT LIABILITY**

A (*manufacturer*) (*seller*) who sells a product in a defective condition which is unreasonably dangerous to the (*user*) (*consumer*) is subject to liability for physical harm (*or property damage*) thereby caused to the ultimate (*user*) (*consumer*), if:

- 1. The (*manufacturer*) (*seller*) is in the business of (*making*) (*selling*) such a product; and**
- 2. It is expected that the product will reach and does reach the (*user*) (*consumer*) without substantial change in the condition in which it is sold.**

This rule applies although the (*manufacturer*) (*seller*) has exercised all possible care in the preparation and sale of (*his*) (*her*) product and although the (*user*) (*consumer*) has not bought the property from or entered into any contractual relation with the seller.

A product is in a defective condition if it has (*a defect*) (*defects*) in (*design*) (*manufacturing*) (*instructions*) (*warnings*), and such (*a defect*) (*defects*) existed at the time the product left the (*manufacturer's*) (*seller's*) hands.

A defective condition is unreasonably dangerous if it is dangerous when used in the way it is ordinarily used considering the product's characteristics and common usage, and is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.

Comment

This instruction is based upon the theory of strict or enterprise liability which is embodied in Restatement, 2d Torts, 402A, which provides as follows:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
 - (a) The seller is engaged in the business of selling such a product, and
 - (b) It is expected to reach the user or consumer in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although:
 - (a) The seller has exercised all possible care in preparation and sale of his product, and
 - (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

Traditionally under Kansas decisions a person who has been injured by a defective product based his action for recovery against a manufacturer or seller upon two theories. First, his claim can be predicated in negligence, in which case in order to recover he must establish that the seller had a duty of due care, breached that duty, and that the breach was the cause of plaintiff's injury. A second theory of recovery is to base liability on breach of a warranty. This theory is not based on any concept of fault, as is the case with negligence, but is based on an express or implied agreement that the seller makes when he supplies a product.

The early cases held that the party injured by a defective product could not recover on a theory of breach of warranty unless there was privity of contract between the injured party and the manufacturer or seller of the product. This requirement of privity was later eliminated in warranty cases by a series of decisions holding that implied warranties are created not by any actual agreement between the parties but by operation of law. *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953). Privity was also eliminated by an amendment to the Uniform Commercial Code which extended the umbrella of protection for breach of warranty beyond contractual parties to "any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty." (K.S.A. 84-2-318). With the removal of the requirement of privity the concept that a cause of action for an injury resulting from a defective product should be based on the contract theory of warranty became logically unacceptable to many judges and lawyers. The result was the development of the theory of strict liability in tort to be applied in products liability cases.

The landmark case is *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963). The rule of *Greenman*, which recognizes the theory of strict liability, has been adopted in a number of jurisdictions. Liability under the rule of these cases is "strict" in the sense that it is unnecessary to prove the defendant's negligence and, since the theory of liability is in tort, the defendant cannot avail himself of the usual contract or warranty defenses, such as lack of privity of contract, lack of notice to the defendant of breach of warranty, lack of reliance on a warranty, or disclaimer of implied warranties, which might be available in an action for breach of warranty. The strict liability doctrine is a vehicle of social policy and looks toward protection of the public safety. The purpose of imposing strict liability is said to be to ensure that the costs of injuries resulting from defective products are borne by those who market such products, rather than by the injured persons, who are powerless to protect themselves. See Restatement, 2d Torts, § 402A, comment (c).

The value of strict tort liability is that the courts can reach the same result in a more direct and simple manner than under the theory of breach of warranty. The simplicity of the new theory has made products liability litigation less complicated, less time consuming, and less costly. It should be emphasized that the theory of strict liability does not treat a manufacturer or seller as an insurer against any injuries caused by the use of its product. In order to establish liability the injured party must prove:

- (1) That the manufacturer or seller put on the market a product in a defective condition unreasonably dangerous to the consumer; and
- (2) That the defective product was the cause or contributed to cause the injury complained of.

Restatement, 2d Torts, 402A, was originally adopted by the drafters to make it clear that the liability of a manufacturer or seller for a defective product does not depend upon the intricacies of the law of sales. In Kansas the decisions of our Supreme Court have emphasized several times that the obligation of a manufacturer or seller to refrain from placing defective products on the market is based not upon contract but is imposed by the law on the basis of public policy. *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954); *Chandler v. Anchor Serum Co.*, 198 Kan. 571, 426 P.2d 82 (1967); *Huebert v. Federal Pacific Electric Co.*, 208 Kan. 720, 494 P.2d 1210 (1972).

This rule has now been expressly adopted by the Supreme Court of Kansas in *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104 (1976). The case involved a suit against a manufacturer for damages arising from an explosion of a home furnace.

In *Kennedy v. City of Sawyer*, 228 Kan. 439, 446, 618 P.2d 788 (1980), the court held that under the doctrine of strict liability, the liability of a manufacturer and those in the chain of distribution extends to those individuals to whom injury from a defective product may reasonably be foreseen. This is true only in those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable it may be used.

The Kansas Product Liability Act establishes defenses for a “product seller” (K.S.A. 60-3306(a)) and a “product seller that is a retail seller of used products” (K.S.A. 60-3306(b)). To take advantage of these defenses, a product seller or retail seller of used products must establish facts specified in the appropriate subsection of the statute.

The Committee has concluded that generally no additional instructions are required under these provisions. The defenses, if asserted by a seller, would ordinarily be determined by the court on a motion for summary judgment.

The original instruction defined the terms “defective condition” and “unreasonably dangerous” to conform to the consumer expectation test adopted by the Supreme Court in *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982). The consumer expectation test was also adhered to in *Barnes v. Vega Industries, Inc.*, 234 Kan. 1012, 1014, 676 P.2d 671 (1984), and *Betts v. General Motors Corp.*, 236 Kan. 108, 115, 689 P.2d 795 (1984). PIK 2d 13.21, 13.22, and 13.23 [antecedent of PIK 4th 128.17, 128.18, and 128.19] were approved in *Siruta v. Hesston Corp.*, 232 Kan. 654, 668-69, 659 P.2d 799 (1983), also a consumer expectation case.

The current instruction is modified to conform with *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 886 P.2d 869 (1994), a case involving a toxic herbicide and labeling. The plaintiff therein sought to prevail upon a strict liability theory of design defect without proving any specific design defect. The plaintiff sought only to prove that the product caused cancer and thus was an unreasonably dangerous and defective product. The court disapproved of the plaintiff’s position. The court noted that the then PIK 13.21 [antecedent of PIK 4th 128.17] not only defined “unreasonably dangerous” in terms of the consumer expectations test, but also defined “defect” by way of the consumer expectations test. The court further stated, “We question whether there is such a thing as a strict liability claim based on a ‘pure consumer expectation test.’” (Emphasis added). 256 Kan. at 624.

The *Jenkins* court stated that imposing liability for a product without identifying what aspect of that product is defective does not further these public policy considerations. The court, citing *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982), stated:

“In *Lester*, this court acknowledged the requirement that a product be both defective and unreasonably dangerous.” 256 Kan. at 630.

The court concluded that without proof of a specific claim of defect the plaintiff may not prevail.

Restatement (Second) of Torts, 402A, comment *k* excludes “unavoidably unsafe products” from the coverage of strict liability for design defects. This doctrine has been recognized in *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986). Comment *k* is meant to shield a manufacturer from liability when the product cannot be designed more safely, not when the product was mismanufactured or was not accompanied by adequate warnings. *Savina v. Sterling Drug, Inc.*, 247 Kan. 105, 115, 795 P.2d 915 (1990).

It should be noted that a strict liability theory is not applicable to a manufacturer’s post-sale duty to warn. A negligence analysis is more appropriate. *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 861 P.2d 1299 (1993).

The Kansas Product Liability Act applies to actions based on strict liability in tort as well as negligence involving property damage, personal physical injuries and attendant anguish or emotional harm. *Fennesy v. LBI Mgt., Inc.*, 18 Kan. App. 2d 61, 847 P.2d 1350 (1993).

In *Elite Professionals, Inc. v. Carrier Corp.*, 16 Kan. App. 2d 625, 827 P.2d 1195 (1992), it was held that disclaimer of warranty is not an available defense to a strict liability in tort claim.

Emphasizing the distinction between tort and contract, Kansas has adopted the “economic loss rule” which states that a buyer of defective goods cannot sue in tort, either negligence or strict liability, when the only injury consists of damage to the goods themselves. The action must be brought in contract. *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 960 P.2d 255, *rev. denied* 265 Kan. 885 (1998).

Construing the common law of Kansas in tandem with the Kansas Products Liability Act, K.S.A. 60-3301 *et seq.*, the Kansas Supreme Court concluded that sellers of used products are subject to strict products liability in Kansas. *Gaumer v. Rossville Truck & Tractor Co.*, 292 Kan. 749, Syl. ¶¶ 3, 4, 257 P.3d 292 (2011).

128.18

**PRODUCTS LIABILITY—STRICT LIABILITY—
ISSUE INSTRUCTION**

The plaintiff _____ is entitled to recover from the defendant _____ for *(his) (her)* injuries provided you find the following from the evidence:

1. The defendant _____ is engaged in the business of *(manufacturing) (selling)* a product *(describe here the product claimed to be defective)*.

2. The product was in a defective condition and unreasonably dangerous to persons who might be expected to use the product.

3. The product was in a defective condition at the time it left the control of the defendant _____.

4. The product was expected to reach and did reach the hands of the plaintiff without substantial change in the condition in which it was *(manufactured) (sold)*.

5. The defect in the product was the cause or contributed to cause plaintiff's injuries and damages.

Notes on Use

This instruction should be given following PIK 4th 128.17, Special Liability of Manufacturer or Seller of Product to User or Consumer—Strict Liability. It sets forth the elements which must be proved by plaintiff in order for him or her to recover in the specific products liability case being tried.

Comment

In *Prentice v. Acme Machine & Supply Co.*, 226 Kan. 406, 601 P.2d 1093 (1979), the Supreme Court held that PIK 2d 13.21 and 13.22 [antecedent of PIK 4th 128.17 and 128.18] should be given together for maximum understanding by the jury of the law of strict liability. PIK 2d 13.22 and 13.23 [PIK 4th 128.18 and 128.19] were cited with approval in *Siruta v. Hesston Corp.*, 232 Kan. 654, 668-69, 659 P.2d 799 (1983).

A strict liability theory is not applicable to a manufacturer's post-sale duty to warn. A negligence analysis is more appropriate. *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 861 P.2d 1299 (1993). Disclaimer of warranty is not a defense to a strict liability in tort claim. *Elite Professionals, Inc. v. Carrier Corp.*, 16 Kan. App. 2d 625, 827 P.2d 1195 (1992).

The Kansas Product Liability Act applies to actions based on strict liability in tort as well as negligence involving property damage, personal physical injuries and attendant anguish or emotional harm. *Fennesy v. LBI Mgt., Inc.*, 18 Kan. App. 2d 61, 847 P.2d 1350 (1993).

Miller v. Lee Apparel Co., 19 Kan. App. 2d 1015, 881 P.2d 576 (1994), states that regardless of the theory of recovery, proof that the defendant caused the injury is a prerequisite to recovery.

128.19

**PRODUCTS LIABILITY—STRICT LIABILITY IN TORT—
UNREASONABLE USE AS A DEFENSE—COMPARATIVE FAULT**

It is a defense to an action against a (*manufacturer*) (*seller*) for injuries resulting from the use of an unreasonably dangerous product, that the person injured discovered the defect in the product, became aware of the danger, and unreasonably continued to use the product.

Unreasonable use of the product may be considered in determining the comparative fault of the parties.

Notes on Use

The rules of comparative fault apply when liability is predicated on negligence. This instruction should be used where the defense of unreasonable use of a defective product is asserted by the manufacturer or seller. For actions brought on the theory of breach of warranty, see PIK 4th 128.16, Express or Implied Warranty—Unreasonable Use as a Defense—Comparative Fault.

Comment

Contributory negligence is not a defense in a products liability action brought under the theory of strict liability. Restatement (Second) of Torts, 402A, comment n. If, however, the user or consumer discovers the defect, is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it he is barred from recovery. *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104 (1976). The defense of unreasonable use of a product has also been recognized in warranty cases in Kansas. See *Huebert v. Federal Pacific Electric Co.*, 208 Kan. 720, 494 P.2d 1210 (1972); *Bereman v. Burdolski*, 204 Kan. 162, 460 P.2d 567 (1969). Neither is disclaimer of warranty a defense to strict liability in tort claim. *Elite Professionals, Inc. v. Carrier Corp.*, 16 Kan. App. 2d 625, 827 P.2d 1195 (1992).

Where the plaintiff's action is based on a theory of negligence, negligence of the plaintiff in the use of a product will not bar recovery but will diminish plaintiff's recovery under the comparative negligence statute, K.S.A. 60-258a. A question properly arises whether comparative fault should apply if the theory of the plaintiff's case is strict liability in tort. If the language of the statute is read literally, it appears to be applicable only in cases involving negligence and is not applicable where plaintiff's theory is strict liability.

However, it is difficult to understand why plaintiff's unreasonable use of the product should be a complete bar when the plaintiff's theory is strict liability, but will only diminish the recovery when the defendant has been sued for negligence. Several courts have been faced with this problem and have applied the concept of comparative fault in a strict liability case. Such a position was adopted by the Wisconsin Supreme Court in *Dippel v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55 (1967). More recently the Supreme Court of Alaska applied the doctrine of comparative fault where the plaintiff was proceeding on the theory of strict liability. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976). The application of the comparative fault procedure to strict liability cases has been recommended by a number of writers on the subject: Schwartz, *Comparative Negligence in Kansas, Legal Issues and Probable Answers*, 13 Washburn L J 397, 411 (Summer 1974); Kelly, *Comparative Negligence—Kansas*, 43 JBK 151, 198 (Fall 1974); Vasos, *Comparative Negligence Update—A Discussion of Selected Issues*, 44

J.B.A.K. 13, 42 (Spring 1975); Products Liability Position Paper, Defense Research Institute, Inc., 1976, Vol. 9 at page 16.

In *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980), the Supreme Court held that the doctrine of comparative fault is applicable to both strict liability claims and to claims based on implied warranty in products liability cases.

128.20

**PRODUCTS LIABILITY—RIGHT TO RECOVER LIMITED
TO USEFUL SAFE LIFE OF PRODUCT**

A (*manufacturer*) (*seller*) is not subject to liability in a products liability claim if the (*manufacturer*) (*seller*) proves that the harm was caused after the product's useful safe life had expired. "Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. "Time of delivery" means the time of delivery of the product to its first (*purchaser*) (*lessee*) who (*buys*) (*leases*) it to use it.

It is for you to determine whether the useful safe life of the product had expired at the time the injury occurred in this case. In making such a determination, you may consider the following factors:

- 1. The amount of wear and tear to which the product has been subject;**
 - 2. the effect of deterioration from natural causes, from climate, and from other conditions under which the product was used or stored;**
 - 3. the normal practices of the user, similar users and the product seller with respect to the circumstances, frequency, and purposes of the product's use, and with respect to repairs, renewals, and replacements;**
 - 4. any representations, instructions, or warnings made by the product seller concerning proper maintenance, storage, and use of the product or the expected useful safe life of the product; and**
 - 5. any modification or alteration of the product by a user or third party.**
- If you find that the defendant has proved to your satisfaction that the injury suffered by the plaintiff in this case was caused at a time after the useful safe life of the product had expired, then the plaintiff is not entitled to recover from the defendant.**

Notes on Use

This instruction has been included to comply with the "useful safe life" concept contained in the Kansas Product Liability Act (K.S.A. 60-3303).

It should be noted under K.S.A. 60-3303(a)(2), a product seller may be subject to liability for harm caused by a product used beyond its useful safe life to the extent that the product seller has expressly warranted the product for a longer period. The existence of such an express warranty would be a question of law for the trial court to determine. If such an express warranty exists, then this instruction would not be required.

Comment

Under the Kansas Product Liability Act (K.S.A. 60-3303(b)(2)), if a claim involving harm occurs more than ten years after the time of delivery, then a presumption arises that the harm resulted after the useful safe life of the product had expired. In this regard, see PIK 4th 128.21, Products Liability—Presumption of Expiration of Useful Safe Life of Product After Use for 10 Years.

128.21

**PRODUCTS LIABILITY—PRESUMPTION OF EXPIRATION OF
USEFUL SAFE LIFE OF PRODUCT AFTER USE FOR 10 YEARS**

In a products liability claim, when the injury to the plaintiff occurred more than ten years after the time of delivery of the product, the law presumes that the harm was caused after the useful safe life of the product had expired. Unless this presumption has been overcome by clear and convincing evidence to the contrary, you must find that the harm suffered by plaintiff in this case was caused after the useful safe life of the product had expired and plaintiff may not recover.

[You are further instructed that the ten-year-period presumption does not apply, if the (*manufacturer*) (*seller*) intentionally misrepresented facts about its product or fraudulently concealed information about it, and that conduct was a substantial cause of the plaintiff's harm.]

[You are further instructed that the ten-year-period presumption does not apply if the harm to plaintiff was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by a reasonably prudent person until more than ten years after the time of delivery, or if the harm caused within ten years after the time of delivery, did not manifest itself until after that time.]

[You are further instructed that the ten-year-period presumption does not apply to the time to discover a disease which is latent and caused by exposure to a harmful material.]

Notes on Use

This instruction covers the ten-year presumption created by the Kansas Product Liability Act (K.S.A. 60-3303). It should be given, if appropriate, only in cases where the plaintiff suffered injury more than ten years after the time of delivery of the product.

Comment

The Kansas Product Liability Act provides a two-year statute of limitations for a product liability claim, unless exceptions stated or referenced within the act apply. Such exceptions are termed as “periods of repose.” *Fennesy v. LBI Mgt., Inc.*, 18 Kan. App. 2d 61, 847 P.2d 1350 (1993). See also *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 831 P.2d 958 (1992); *Baumann v. Excel Industries, Inc.*, 17 Kan. App. 2d 807, 845 P.2d 65 (1993).

128.22

SINGLE OR MULTIPLE THEORIES OF LIABILITY

The claim(s) of the plaintiff *(is) (are)* based on the fault *(theory) (alternative theories)* of *(negligence) (implied warranty) (strict liability)*. Under *(this theory) (each alternative theory)* the plaintiff has the burden of proving the following:

1. The product was a defective product,
2. The defect must have existed at the time it left the *(manufacturer's) (seller's)* possession or control,
3. The plaintiff suffered damages as a result of the defect, and
4. The elements necessary to impose liability upon the defendant are present under *(at least one of)* the fault *(theory) (theories)* of *(negligence) (implied warranty) (strict liability)* as set forth in Instruction(s) _____.

If you find the plaintiff proved *(the theory) (any one or more of the theories)* you should next consider the question of comparative fault as outlined in other instructions. *(It is not necessary for the plaintiff to prove each theory of liability upon which the plaintiff brings the action.)*

Each party has the burden of proving its claims of fault against any other party.

Notes on Use

This instruction should be used in every products liability action whether single or multiple theories are employed. This instruction should be used after those portions of PIK 4th 106.01, which summarize the issues and contentions of the parties.

Comment

This instruction directs consideration by the jury of fault comparison on the part of plaintiff, defendant or any other person. *Greenwood v. McDonough Power Equipment, Inc.*, 437 F. Supp. 707 (D. Kan. 1977). Claims predicated upon breach of implied warranty as well as strict liability are subject to comparative fault treatment. *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980). This instruction is designed to show the general relationship of liability of a manufacturer or seller predicated upon negligence (PIK 4th 128.01), implied warranty (PIK 4th 128.10 and 128.11), and strict liability (PIK 4th 128.17).

Negligence, breach of implied warranty, and strict liability are alternative theories of liability. *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976); *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104 (1976); *Jacobson v. Ford Motor Co.*, 199 Kan. 64, 427 P.2d 621 (1967); *Fennesy v. LBI Mgt., Inc.*, 18 Kan. App. 2d 61, 847 P.2d 1350 (1993).

Regardless of whether the plaintiff is claiming damages under negligence, breach of warranty, or strict liability the plaintiff must prove the product was defective; it was defective at the time it left the defendant's possession or control; and, that the plaintiff suffered damages as a result of such defect. *Lane*

v. Redman Mobile Homes, Inc., 5 Kan. App. 2d 729, 733, 624 P.2d 984, *rev. denied* 229 Kan. 670 (1981). See also the discussion in the comment to PIK 4th 128.17 regarding the necessity of proving a defective product.

A. DECEPTIVE ACTS OR PRACTICES**129.01****DEFINITIONS**

“Agricultural purpose” means a purpose related to the production, harvest, exhibition, marketing, transportation, processing or manufacture of agricultural products by a consumer who cultivates, plants, propagates or nurtures the agricultural products. **“Agricultural products”** includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

“Consumer” means an individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes.

“Consumer transaction” means a sale, lease, assignment or other disposition for value of property or services within the state of Kansas to a consumer or a solicitation by a supplier with respect to a sale, lease, assignment or other disposition for value of property or services within the state of Kansas to a consumer.

“Family partnership” means a partnership in which all of the partners are natural persons related to each other, all of whom have a common ancestor within the third degree of relationship, by blood or by adoption, or the spouses or the stepchildren of any such persons, or persons acting in a fiduciary capacity for persons so related.

A matter is **“material”** when a reasonable person would attach importance to it in determining how to act regarding a particular transaction.

“Person” means any individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative or other legal entity.

“Property” includes real estate, goods and intangible property.

“Services” includes (1) work, labor and other personal services; (2) privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals and cemetery accommodations; and (3) any other act performed for a consumer by a supplier.

“Supplier” means a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer.

Notes on Use

Pursuant to K.S.A. 50-624(c), “Consumer transaction” does not include the disposition of repossessed collateral by any supplier that is subject to and compliant with any state or federal law or rules and regulations with regard to disposition of such repossessed collateral. The disposition of repossessed collateral is covered by the Uniform Commercial Code, K.S.A. 84-9-601 *et seq.* Insurance contracts regulated under state law are also excluded from the definition. See K.S.A. 40-2402 *et seq.*

Comment

See K.S.A. 50-624 for definitions of additional applicable terms. The source for the definition of “material” is *Farrell v. General Motors Corp.*, 249 Kan. 231, 815 P.2d 538 (1991). The source for the remaining definitions in this instruction is K.S.A. 50-624. For an instruction on “merchantable” as the term is used in K.S.A. 84-2-314, see PIK 4th 128.11.

To maintain an action under the Kansas Consumer Protection Act, a party is not required to prove all the elements of common-law fraud. KCPA claims must be proven by a preponderance of the evidence, but not by clear and convincing evidence. *Ray v. Ponca/Universal Holdings, Inc.*, 22 Kan. App. 2d 47, 913 P.2d 209 (1995).

The KCPA’s protection is limited to individuals and sole proprietors who directly contract with suppliers for goods or services, and is not extended to individuals who guarantee performance of a corporation contracting with a supplier. *The CIT Group v. E-Z Pay Used Cars, Inc.*, 29 Kan. App. 2d 676, 685, 32 P.3d 1197 (2001).

129.02

MISREPRESENTATIONS

In an action for the deceptive act and practice of making misrepresentations, the *(Plaintiff) (State)* must prove:

1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;
 2. Defendant was a supplier;
- (Insert one or more of the following sets of paragraphs 3, 4 and 5)*

* * *

Misrepresentations of Property or Services—K.S.A. 50-626(b)(1)(A)

3. The Defendant represented to *(Plaintiff)* _____ *(Name of consumer)* that _____ *(list specific property or service)* *(insert one or more of the following)*

- (had the sponsorship of _____);
- (had the approval of _____);
- (had _____ as accessories);
- (had the characteristics of _____);
- (contained the ingredients of _____);
- (could be used as _____);
- (had _____ as benefits);
- (came in quantities of _____);

4. The _____ *(list specific property or service)* *(insert one or more of the following)*

- (did not have the sponsorship of _____; and)
- (did not have the approval of _____; and)
- (did not have _____ as accessories; and)
- (did not have the characteristics of _____; and)
- (did not contain the ingredients of _____; and)
- (could not be used as _____; and)
- (did not have _____ as benefits; and)
- (did not come in quantities of _____; and)

5. The Defendant made such representations to [*(Plaintiff)* _____ *(Name of consumer)*] [*(knowing)* *(with reason to know)*] that _____ *(list specific property or service)* *(insert one or more of the following)*

- (did not have the sponsorship of _____).
- (did not have the approval of _____).

- (did not have _____ as accessories).
- (did not have the characteristics of _____).
- (did not contain the ingredients of _____).
- (could not be used as _____).
- (did not have _____ as benefits).
- (did not come in quantities of _____).

* * *

Misrepresentation of Supplier's Status—K.S.A. 50-626(b)(1)(B)

3. The Defendant represented to (Plaintiff) _____ (Name of consumer) that Defendant had (insert one or more of the following)

- (the sponsorship of _____);
- (the approval of _____);
- (the status of _____);
- (an affiliation with _____);
- (a connection with _____);

4. The Defendant did not have (insert one or more of the following)

- (the sponsorship of _____); and
- (the approval of _____); and
- (the status of _____); and
- (an affiliation with _____); and
- (a connection with _____); and

5. The Defendant made such representation to (Plaintiff) _____ (Name of consumer) [(knowing) (with reason to know)] that Defendant did not have (insert one or more of the following)

- (the sponsorship of _____).
- (the status of _____).
- (the approval of _____).
- (an affiliation with _____).
- (a connection with _____).

* * *

Misrepresentation of Property as Original or New—K.S.A. 50-626(b)(1)(C)

3. The Defendant represented to (Plaintiff) _____ (Name of consumer) that _____ (list property) was original or new;

4. The _____ (list property) was (deteriorated) (altered) (reconditioned) (repossessed) (second-hand) (used to an extent materially different than the representation); and

5. The Defendant made such representation to (Plaintiff) _____ (Name of consumer) [(knowing) (with reason to know)] that the _____ (list property) was (deteriorated) (altered) (reconditioned) (repossessed) (second-hand) (used to an extent materially different than the representation).

* * *

Misrepresentation of Type of Property or Services—K.S.A. 50-626(b)(1)(D)

3. The Defendant represented to (Plaintiff) (Name of consumer) that (list specific property or service) was (state particular [quality] [grade] [style] [model]);

4. The (list specific property or service) was materially different from (state particular [quality] [grade] [style] [model]); and

5. The Defendant made such representation to (Plaintiff) (Name of consumer) [(knowing) (with reason to know)] that (list specific property or service) was not (state particular [quality] [grade] [style] [model]).

* * *

Misrepresentation Regarding Referral Commission on Sales—K.S.A. 50-626(b)(1)(E)

3. To induce (Plaintiff) (Name of consumer) to enter into (describe type of consumer transaction), Defendant represented to (Plaintiff) (Name of consumer) that (Plaintiff) (Name of consumer) would receive a (rebate) (discount) (other benefit);

4. The receipt of the (rebate) (discount) (other benefit) was contingent upon (Plaintiff) (Name of consumer) [(supplying the names of prospective consumers) (helping the Defendant enter into other consumer transactions)]; and

5. The Defendant made such representation to (Plaintiff) (Name of consumer) [(knowing) (with reason to know)] that the receipt of the (rebate) (discount) (other benefit) was contingent upon an event occurring after (Plaintiff) (Name of consumer) entered into the transaction.

* * *

Misrepresentation of Use, Benefits or Characteristics of Property or Services—K.S.A. 50-626(b)(1)(F)

3. The Defendant represented to (Plaintiff) _____ (Name of consumer) that _____ (list specific property or service) had (the use of _____) (the benefit of _____) (the characteristics of _____);

4. The _____ (list specific property or service) did not have (the use of _____) (the benefit of _____) (the characteristics of _____);

5. The Defendant made such representation to (Plaintiff) _____ (Name of consumer) [(knowing) (with reason to know)] that _____ (list specific property or service) did not have (the use of _____) (the benefit of _____) (the characteristics of _____).

The Defendant is not liable on a claim based on misrepresentation of (use) (benefit) (characteristic) of property or services if the Defendant relied upon and possessed a reasonable basis for making such representation.

* * *

Misrepresentation of Proof of Use, Benefits or Characteristics of Property or Services—K.S.A. 50-626(b)(1)(G)

3. The Defendant represented to (Plaintiff) _____ (Name of consumer) that _____ (list specific property or service) had been (proven) _____ (otherwise substantiated) to have (the use of _____) (the benefit of _____) (the characteristics of _____);

4. The _____ (list specific property or service) had not been (proven) _____ (otherwise substantiated) to have (the use of _____) (the benefit of _____) (the characteristics of _____); and

5. The Defendant made such representation to (Plaintiff) _____ (Name of consumer) [(knowing) (with reason to know)] that _____ (list specific property or service) had not been (proven) _____ (otherwise substantiated) to have (the use of _____) (the benefit of _____) (the characteristics of _____).

The Defendant is not liable on a claim based on misrepresentation of proof or substantiation relating to the (use) (benefit) (characteristic) of property or services if the Defendant relied upon and possessed the type and amount of proof or substantiation represented to exist.

* * *

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01)

Notes on Use

See K.S.A. 50-626(b)(1)(A)-(G) for authority. If the plaintiff is claiming a deceptive act or practice under more than one subsection of K.S.A. 50-626(b)(1), the trial judge should give a separate instruction under each subsection to avoid undue length of a single instruction.

Comment

Representation of a repaired vehicle as new is a misrepresentation of property as original or new. *Bell v. Kent-Brown Chevrolet Co.*, 1 Kan. App. 2d 131, 132, 133, 561 P.2d 907 (1977).

To maintain an action under the Kansas Consumer Protection Act, a party is not required to prove all the elements of common-law fraud. KCPA claims must be proven by a preponderance of the evidence, but not by clear and convincing evidence. *Ray v. Ponca/Universal Holdings, Inc.*, 22 Kan. App. 2d 47, 913 P.2d 209 (1995).

In *Williamson v. Amrani*, 283 Kan. 227, 152 P.3d 60 (2007), the Supreme Court held that a physician providing care or treatment to a patient can be found to have engaged in deceptive acts and practices in violation of K.S.A. 50-626 and unconscionable acts and practices in violation of K.S.A. 50-627. In response to *Amrani*, the 2007 Legislature added subsection (b) to K.S.A. 50-635, providing that the KCPA does not allow for a private cause of action against a licensed health care provider for personal injury or death resulting, or alleged to have resulted, from medical negligence. L. 2007, ch. 194, § 1. The Supreme Court, in *Kelly v. VinZant*, 287 Kan. 509, 197 P.3d 803 (2008), held that the changes made in K.S.A. 50-635(b) cannot be applied retroactively.

129.03

WILLFUL MISREPRESENTATION OF A MATERIAL FACT

In an action for the deceptive act and practice of willful misrepresentation of a material fact, the *(Plaintiff) (State)* must prove:

- 1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;**
- 2. Defendant was a supplier;**
- 3. Defendant willfully represented to *(Plaintiff)* _____ *(Name of consumer)*, orally or in writing that _____ *(set forth the representation)*; and**
- 4. Defendant's representation to *(Plaintiff)* _____ *(Name of consumer)* was *(an exaggeration) (falsehood) (innuendo) (ambiguity)* of a material fact.**

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01)

Notes on Use

See K.S.A. 50-626(b)(2) for authority. For a definition of “willful,” see PIK 4th 103.04.

Comment

To maintain an action under the Kansas Consumer Protection Act, a party is not required to prove all the elements of common-law fraud. KCPA claims must be proven by a preponderance of the evidence, but not by clear and convincing evidence. *Ray v. Ponca/Universal Holdings, Inc.*, 22 Kan. App. 2d 47, 913 P.2d 209 (1995).

In *Williamson v. Amrani*, 283 Kan. 227, 152 P.3d 60 (2007), the Supreme Court held that a physician providing care or treatment to a patient can be found to have engaged in deceptive acts and practices in violation of K.S.A. 50-626 and unconscionable acts and practices in violation of K.S.A. 50-627. In response to *Amrani*, the 2007 Legislature added subsection (b) to K.S.A. 50-635, providing that the KCPA does not allow for a private cause of action against a licensed health care provider for personal injury or death resulting, or alleged to have resulted, from medical negligence. L. 2007, ch. 194, § 1.

129.04**WILLFUL FAILURE TO STATE OR WILLFUL CONCEALMENT
OF A MATERIAL FACT**

In an action for the deceptive act and practice of willfully (*failing to state*) (*[concealing]* *[suppressing]* *[omitting]*) a material fact, the (*Plaintiff*) (*State*) must prove:

- 1. (*Plaintiff*) _____ (*Name of consumer*) was a consumer;**
- 2. Defendant was a supplier;**
- 3. Defendant willfully (*failed to state*) (*[concealed]* *[suppressed]* *[omitted]*) _____ (*insert material fact*); and**
- 4. _____ (*Insert material fact*) was a material fact.**

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01)

Notes on Use

See K.S.A. 50-626(b)(3) for authority. For a definition of “willful” see PIK 4th 103.04.

Comment

In *Heller v. Martin*, 14 Kan. App. 2d 48, 52, 782 P.2d 1241 (1989), the court held that K.S.A. 50-626(b)(3) did not apply to mere nondisclosure. Rather it applied only to intentional concealment of or failure to state a material fact.

To maintain an action under the Kansas Consumer Protection Act, a party is not required to prove all the elements of common-law fraud. KCPA claims must be proven by a preponderance of the evidence, but not by clear and convincing evidence. *Ray v. Ponca/Universal Holdings, Inc.*, 22 Kan. App. 2d 47, 913 P.2d 209 (1995).

In *Williamson v. Amrani*, 283 Kan. 227, 152 P.3d 60 (2007), the Supreme Court held that a physician providing care or treatment to a patient can be found to have engaged in deceptive acts and practices in violation of K.S.A. 50-626 and unconscionable acts and practices in violation of K.S.A. 50-627. In response to *Amrani*, the 2007 Legislature added subsection (b) to K.S.A. 50-635, providing that the KCPA does not allow for a private cause of action against a licensed health care provider for personal injury or death resulting, or alleged to have resulted, from medical negligence. L. 2007, ch. 194, § 1.

129.05

**FALSELY DISPARAGING ANOTHER'S PROPERTY,
SERVICES OR BUSINESS**

In an action for the deceptive act and practice of falsely disparaging another's *(property) (services) (business)*, the *(Plaintiff) (State)* must prove:

- 1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;**
- 2. Defendant was a supplier;**
- 3. Defendant disparaged the *(property) (services) (business)* of another by representing _____ *(insert representation)*; and**
- 4. Defendant made such representation *(knowing) (with reason to know)* that it was a *(false) (misleading)* representation of material fact.**

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01)

Notes on Use

See K.S.A. 50-626(b)(4) for authority.

Comment

To maintain an action under the Kansas Consumer Protection Act, a party is not required to prove all the elements of common-law fraud. KCPA claims must be proven by a preponderance of the evidence, but not by clear and convincing evidence. *Ray v. Ponca/Universal Holdings, Inc.*, 22 Kan. App. 2d 47, 913 P.2d 209 (1995).

129.06**OFFERING PROPERTY OR SERVICES FOR SALE WITHOUT
INTENT TO SELL OR ADEQUATELY SUPPLY**

In an action for the deceptive act and practice of offering (*property*) (*services*) for sale without intent to sell or adequately supply, the (*Plaintiff*) (*State*) must prove:

- 1. (*Plaintiff*) _____ (*Name of consumer*) was a consumer;**
- 2. Defendant was a supplier;**
- 3. Defendant offered to sell (*Plaintiff*) _____ (*Name of consumer*) [_____ (*list property or services*)]; (*and*)**
- [4. Defendant did not intend to sell such (*property*) (*services*)].**

OR

[4. Defendant did not intend to supply reasonable, expectable public demand for such (*property*) (*services*)]; and

5. The offer did not disclose the limitation.

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01)

Notes on Use

See K.S.A. 50-626(b)(5) and (6) for authority.

Comment

It is a deceptive practice to delay more than three months before notifying a consumer that an order for a limited production car could not be filled. *Willman v. Ewen*, 6 Kan. App. 2d 321, 323, 627 P.2d 1190 (1981).

To maintain an action under the Kansas Consumer Protection Act, a party is not required to prove all the elements of common-law fraud. KCPA claims must be proven by a preponderance of the evidence, but not by clear and convincing evidence. *Ray v. Ponca/Universal Holdings, Inc.*, 22 Kan. App. 2d 47, 913 P.2d 209 (1995).

129.07

FALSE REPRESENTATIONS

In an action for the deceptive act and practice of making false representations, the *(Plaintiff) (State)* must prove:

1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;

2. Defendant was a supplier;

(Insert one or more of the following sets of paragraphs 3, 4 and 5)

* * *

False Representations as to Price—K.S.A. 50-626(b)(7)

3. The Defendant made the following representation of fact to *[(Plaintiff) _____ (Name of consumer)]*—set forth representation relating to *(the [reason for] [existence of] [amount of] the price reduction); (the price in comparison to [a competitor] [Defendant's own past or future price])*;

4. Such representation was *(false) (misleading)*; and

5. The Defendant made such representation to *[(Plaintiff) _____ (Name of consumer)] (knowing) (with reason to know)* that such representation was *(false) (misleading)*.

* * *

False Representations Regarding Consumer Rights, Remedies or Obligations—K.S.A. 50-626(b)(8)

3. The Defendant represented to *[(Plaintiff) _____ (Name of consumer)] [set forth representation relating to consumer (rights) (remedies) (obligations)]*;

4. Such representation was false; and

5. The Defendant made such representation to *[(Plaintiff) _____ (Name of consumer)] (knowing) (with reason to know)* that such representation was false.

* * *

False Representations Regarding Replacements or Repairs—K.S.A. 50-626(b)(9)

3. The Defendant represented to *(Plaintiff) _____ (Name of consumer)* that *(services) (replacements) (repairs)* were needed;

4. Such representation was false; and

5. The Defendant made such representation to [(Plaintiff) _____ (Name of consumer)] (knowing) (with reason to know) that such representation was false.

* * *

False Representations as to Sale or Discount Price—K.S.A. 50-626(b)(10)

3. The Defendant made the following representation of fact to [(Plaintiff) _____ (Name of consumer)] (set forth representation relating to the reason for offering or supplying [property] [service] at [sale] [discount] prices);

4. Such representation was false; and

5. The Defendant made such representation to [(Plaintiff) _____ (Name of consumer)] (knowing) (with reason to know) that such representation was false.

* * *

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01)

Notes on Use

See K.S.A. 50-626(b)(7), (8), (9) and (10) for authority. If the plaintiff is claiming a deceptive act or practice under more than one subsection, the trial judge should give a separate instruction under each subsection to avoid undue length of a single instruction.

Comment

To maintain an action under the Kansas Consumer Protection Act, a party is not required to prove all the elements of common-law fraud. KCPA claims must be proven by a preponderance of the evidence, but not by clear and convincing evidence. *Ray v. Ponca/Universal Holdings, Inc.*, 22 Kan. App. 2d 47, 913 P.2d 209 (1995)

129.08

SOLICITATION WHICH APPEARS TO BE A BILL

In an action for the deceptive act and practice of *(sending) (delivering)* a solicitation which looks like a bill, the *(Plaintiff) (State)* must prove:

1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;
2. Defendant was a supplier; and
3. The Defendant *(sent) (delivered)* a solicitation for the purchase of *(goods) (services)* which reasonably could be *(interpreted) (construed)* as a *(bill) (invoice) (statement of account due)*.

[It is a defense to a claim of *(sending) (delivering)* a solicitation which looks like a bill that such solicitation contains the following notice on its face, in conspicuous and legible type in contrast by typography, layout or color with other printing on its face:

“THIS IS A SOLICITATION FOR THE PURCHASE OF GOODS OR SERVICES AND NOT A BILL, INVOICE OR STATEMENT OF ACCOUNT DUE. YOU ARE UNDER NO OBLIGATION TO MAKE ANY PAYMENTS UNLESS YOU ACCEPT THIS OFFER.”]

OR

[If such solicitation is made by a classified telephone directory service not affiliated with a local telephone service, it is a defense to a claim of *(sending) (delivering)* a solicitation which looks like a bill that such solicitation contains the following notice on its face, in conspicuous and legible type in contrast by typography, layout or color with other printing on its face:

“THIS IS A SOLICITATION FOR THE PURCHASE OF GOODS OR SERVICES AND NOT A BILL, INVOICE OR STATEMENT OF ACCOUNT DUE. YOU ARE UNDER NO OBLIGATION TO MAKE ANY PAYMENTS UNLESS YOU ACCEPT THIS OFFER.”

and that the solicitation also contains the following notice, on its face, in prominent and conspicuous manner:

“_____ *(Name of telephone directory service)* IS NOT AFFILIATED WITH ANY LOCAL TELEPHONE COMPANY.”]

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01)

Notes on Use

See K.S.A. 50-626(b)(11) for authority.

Comment

To maintain an action under the Kansas Consumer Protection Act, a party is not required to prove all the elements of common-law fraud. KCPA claims must be proven by a preponderance of the evidence, but not by clear and convincing evidence. *Ray v. Ponca/Universal Holdings, Inc.*, 22 Kan. App. 2d 47, 913 P.2d 209 (1995).

129.09

**ATTEMPT TO COLLECT OR BILL FOR UNORDERED
PROPERTY OR SERVICES**

In an action for the deceptive act and practice of attempting to collect or bill for unordered (*property*) (*services*), the (*Plaintiff*) (*State*) must prove:

- 1. Defendant was a supplier; and**
- 2. The Defendant delivered (*property*) (*services*) not affirmatively (*ordered*) (*requested*) by (*Plaintiff*) _____ (*Name of recipient*); and**
- 3. Defendant attempted to (*collect*) (*bill*) for unordered (*property*) (*services*).**

For purposes of this instruction, the following definitions apply:

“Unordered” means property or services not specifically requested by the recipient in an affirmative manner according to the terms under which they are being offered. Property or services are not considered affirmatively ordered or requested if a person fails to respond to a negative option invitation or announcement to purchase the property or services, and the property or services are provided notwithstanding.

“Negative option invitation or announcement” means any material sent by a supplier which identifies property or services which a supplier proposes to send or sends to recipients, and the recipients are thereafter billed for the property or services identified in the material, unless by a date or within a time specified by the supplier, the recipients, in conformity with the supplier’s terms set forth in the material, instruct the supplier not to send the identified property or services.

(Insert applicable definitions from PIK 4th 129.01)

Notes on Use

See K.S.A. 50-617 for authority.

B. DOOR-TO-DOOR SALES

129.21

DEFINITIONS

“Door-to-door sale” means a sale, lease or rental of consumer property or services with a purchase price of \$25 or more, whether under single or multiple consumer transactions, in which the supplier or the supplier’s representative personally solicits the sale, including those in response to or following an invitation by the consumer, and the consumer’s agreement or offer to purchase is made at a place other than the place of business of the supplier. The term “door-to-door sale” does not include a transaction:

1. made pursuant to prior negotiations in the course of a visit by the consumer to a retail business establishment having a fixed permanent location where the property is exhibited or the services are offered for sale on a continuing basis; or

2. in which the consumer is accorded the right of rescission by the provisions of the consumer credit protection act or regulations issued pursuant thereto; or

3. in which the consumer has initiated the consumer transaction and the property or services are needed to meet a bona fide immediate personal emergency of the consumer, and the consumer furnishes the supplier with a separate dated and signed personal statement in the consumer’s handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three business days; or

4. conducted and consummated entirely by mail or telephone; and without any other contact between the consumer and the supplier or its representative prior to delivery of the property or performance of the services; or

5. in which the consumer has initiated the transaction and specifically requested the supplier to visit the consumer’s home for the purpose of repairing or performing maintenance upon the consumer’s real or personal property. If in the course of such a visit, the supplier sells the consumer the right to receive additional services or property other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of the additional property or services would not fall within this exclusion; or

6. pertaining to the sale or rental of real property, to the sale of insurance or to the sale of securities or commodities by a broker-dealer registered with the securities and exchange commission.

“Place of business” means the main or permanent branch office of a supplier.

“Purchase price” means the total price paid or to be paid for the consumer property or services, including all interest and service charges.

“Business day” means any calendar day except Sunday, or any legal holiday.

Notes on Use

See K.S.A. 50-640(c) for authority.

129.22

FAILURE TO FURNISH COPY OF CONTRACT

In an action for the deceptive act and practice of failing to provide a receipt or copy of the contract pertaining to a door-to-door sale, the *(Plaintiff)* *(State)* must prove:

1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;
2. Defendant was a supplier;
3. The *(Defendant)* *(Defendant's representative)* personally solicited to *(sell)* *(lease)* *(rent)* and the *(Plaintiff)* _____ *(Name of consumer)* agreed or offered to [*(purchase)* *(lease)* *(rent)*] _____ *(insert description of consumer property or services)* in a door-to-door sale for a sum of \$25 or more; and
4. At the time *(Plaintiff)* _____ *(Name of consumer)* signed the contract pertaining to the *(sale)* *(lease)* *(rental)*, the Defendant failed to furnish *(Plaintiff)* _____ *(Name of consumer)* with a receipt or copy of the contract that [list one or more of the following]

(was in the same language as that principally used in the oral presentation)

(showed the date of the transaction)

(contained the name and address of the supplier)

(contained [in immediate proximity to the space reserved for the signature of the *(Plaintiff)* _____ *(Name of consumer)*] [on the front page of the receipt if a contract is not used] a statement in boldface type with a minimum size of 10 points that has substantially the following form:

“YOU THE BUYER MAY CANCEL THIS TRANSACTION AT ANYTIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.”

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01 and 129.21)

Notes on Use

See K.S.A. 50-640(b)(1) for authority. See K.S.A. 50-640(c) for definitions.

129.23

FAILURE TO PROVIDE NOTICE OF RIGHT TO CANCEL

In an action for the deceptive act and practice of failing to provide notice of the right to cancel a door-to-door transaction, the *(Plaintiff) (State)* must prove:

1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;
2. Defendant was a supplier;
3. The *(Defendant) (Defendant's representative)* personally solicited to *(sell) (lease) (rent)* and the *(Plaintiff)* _____ *(Name of consumer)* agreed or offered to [*(purchase) (lease) (rent)*] _____ *(insert description of consumer property or services)* in a door-to-door sale for a sum of \$25 or more; and
4. *(Insert one or more of the following paragraphs)*
Failure to Furnish Notice of Cancellation Form—K.S.A. 50-640(b)(2)

[At the time the Plaintiff signed a contract or otherwise agreed to *(purchase) (lease) (rent)* _____ *(insert description of consumer property or services)*, the Defendant failed to furnish the Plaintiff with a completed form, in duplicate, with the caption “NOTICE OF CANCELLATION,” and which contained in 10-point boldface type the following information and statements in the same language as was used in the contract:

NOTICE OF CANCELLATION

(date of transaction)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY PROPERTY DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY, IF YOU WISH, COMPLY

WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE PROPERTY AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE PROPERTY AVAILABLE TO THE SELLER, AND IF THE SELLER DOES NOT PICK SUCH PROPERTY UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE PROPERTY WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE PROPERTY AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE PROPERTY TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO *(Name of Seller)* AT *(Address of Seller's Place of Business)* NOT LATER THAN MIDNIGHT OF _____. (Date)

I HEREBY CANCEL THIS TRANSACTION.]

Failure for Complete Notice of Cancellation Form—K.S.A. 50-640(b)(3)

[The copies of the Notice of Cancellation provided to *(Plaintiff)* _____ *(Name of consumer)* failed to contain *(the name and address of the supplier)* *(the date of the transaction)* *(a date, not earlier than the third business day following the date of the transaction, by which the consumer could give notice of cancellation)*.]

Failure to Orally Inform of Right to Cancel—K.S.A. 50-640(b)(5)

[The Defendant failed to inform the *(Plaintiff)* _____ *(Name of consumer)* orally of *(his)* *(her)* right to cancel the sale at the time the Plaintiff *(signed a contract)* *(purchased the property or services)*.]

Misrepresentation of Right to Cancel—K.S.A. 50-640(b)(6)

[The Defendant misrepresented the *(Plaintiff)* _____ *(Name of consumer)*'s right to cancel the sale by _____ *(insert specific misrepresentation)*.]

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01 and 129.21)

Notes on Use

See K.S.A. 50-640(b)(2), (3), (5) and (6) for authority. See K.S.A. 50-640(c) for definitions.

129.24

INCLUSION OF CONFESSION OF JUDGMENT OR WAIVER OF RIGHTS

In an action for the deceptive act and practice of including a confession of judgment or waiver of rights in a sales contract or receipt pertaining to a door-to-door sale, the *(Plaintiff) (State)* must prove:

- 1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;**
- 2. Defendant was a supplier;**
- 3. The *(Defendant) (Defendant's representative)* personally solicited to *(sell) (lease) (rent)* and the *(Plaintiff)* _____ *(Name of consumer)* agreed or offered to [*(purchase) (lease) (rent)*] _____ *(insert description of consumer property or services)* in a door-to-door sale for a sum of \$25 or more; and**
- 4. The *(sale) (lease) (rental)* [(contract signed by the *(Plaintiff)* _____ *(Name of consumer)*] (*receipt of such contract*) included a *(confession of judgment)* (waiver of _____ *[insert right to which Plaintiff was entitled under K.S.A. 50-640]*).**

For purposes of this instruction, the following definitions apply:

(Insert other applicable definitions from PIK 4th 129.01 and 129.21)

Notes on Use

See K.S.A. 50-640(b)(4) for authority. See K.S.A. 50-640(c) for definitions

129.25

FAILURE TO HONOR CANCELLATION

In an action for the deceptive act and practice of failing to honor a cancellation of a door-to-door sale, the *(Plaintiff) (State)* must prove:

1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;
2. Defendant was a supplier;
3. The *(Defendant) (Defendant's representative)* personally solicited to *(sell) (lease) (rent)* and the *(Plaintiff)* _____ *(Name of consumer)* agreed or offered to [*(purchase) (lease) (rent)*] _____ *(insert description of consumer property or services)* in a door-to-door sale for a sum of \$25 or more;
4. The *(Plaintiff)* _____ *(Name of consumer)* gave valid notice of cancellation of the contract by mailing or delivering written notice of cancellation to the Defendant at the address provided by the Defendant in the "Notice of Cancellation" form not later than _____ *(insert date provided in the "notice of cancellation" form)*; and
5. Within 10 business days after receipt of such notice, _____ *(insert one or more of the following)*
The Defendant failed or refused to honor the cancellation.

OR

The Defendant failed to

(refund all payments made under the contract of sale.)

(return any property traded in, in substantially as good condition as when received by the Defendant.)

(cancel and return any negotiable instrument executed by the *(Plaintiff)* _____ *(Name of consumer)* in connection with the contract or sale.)

(take any action necessary or appropriate to terminate promptly any security interest created in the transaction.)

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01 and 129.21)

Notes on Use

See K.S.A. 50-640(b)(7) for authority. See K.S.A. 50-640(c) for definitions.

129.26

TRANSFER OF NOTE TO THIRD PARTY

In an action for the deceptive act and practice of transferring a note or other evidence of indebtedness pertaining to a door-to-door sale, the *(Plaintiff)* *(State)* must prove:

- 1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;**
- 2. Defendant was a supplier;**
- 3. The *(Defendant)* *(Defendant's representative)* personally solicited to *(sell)* *(lease)* *(rent)* and the *(Plaintiff)* _____ *(Name of consumer)* agreed or offered to [*(purchase)* *(lease)* *(rent)*] _____ *(insert description of consumer property or services)* in a door-to-door sale for a sum of \$25 or more; and**
- 4. The Defendant *(negotiated)* *(transferred)* *(sold)* *(assigned)* the *(Plaintiff)* _____ *(Name of consumer)*'s [*(note)* _____ *(insert other evidence of indebtedness)*] to _____ *(name of finance company)* _____ *(name of other third party)* prior to midnight of the fifth day following the day the *(contract was signed)* *(property or services were purchased)*.**

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01 and 129.21)

Notes on Use

See K.S.A. 50-640(b)(8) for authority. See K.S.A. 50-640(c) for definitions.

129.27

**FAILURE TO TIMELY NOTIFY OF INTENT
TO REPOSSESS OR ABANDON**

In an action for the deceptive act and practice of failing to timely notify of intent to repossess or abandon property relating to a door-to-door sale, the *(Plaintiff) (State)* must prove:

- 1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;**
- 2. Defendant was a supplier;**
- 3. The *(Defendant) (Defendant's representative)* personally solicited to *(sell) (lease) (rent)* and the *(Plaintiff)* _____ *(Name of consumer)* agreed or offered to [*(purchase) (lease) (rent)*] _____ *(insert description of consumer property or services)* in a door-to-door sale for a sum of \$25 or more;**
- 4. *(Plaintiff)* _____ *(Name of consumer)* gave valid notice of cancellation of the contract by mailing or delivering written notice of cancellation to the Defendant at the address provided by the Defendant in the "Notice of Cancellation" form not later than _____ *(insert date provided in the "notice of cancellation" form)*; and**
- 5. The Defendant failed to notify *(Plaintiff)* _____ *(Name of consumer)*, within 10 business days of receipt of such notice of cancellation, whether Defendant intended to repossess or to abandon any shipped or delivered property.**

For purposes of this instruction, the following definitions apply:

(Insert other applicable definitions from PIK 4th 129.01 and 129.21)

Notes on Use

See K.S.A. 50-640(b)(9) for authority. See K.S.A. 50-640(c) for definitions.

C. COLLISION DAMAGE WAIVER**129.31****DEFINITIONS**

“Authorized driver” means the lessee, the lessee’s spouse if such spouse is a licensed driver and satisfies the lessor’s minimum age requirement, any person who operates the vehicle during an emergency situation, or any person listed by the lessor on such lessee’s contract as an authorized driver.”

“Collision damage waiver” means any contract or contractual provision, whether separate from or a part of a motor vehicle rental agreement, whereby the lessor agrees for a charge, to waive any and all claims against the lessee for any damage to the rental motor vehicle during the term of the rental agreement.

“Lessor” means any person or organization in the business of providing rental motor vehicles to the public.

“Lessee” means any person or organization obtaining the use of a rental motor vehicle from a lessor under the terms of a rental agreement.

“Rental agreement” means any written agreement setting forth the terms and conditions governing the use of the rental motor vehicle by the lessee for a period of 60 days or less.

“Rental motor vehicle” means a private passenger type vehicle or commercial type vehicle which, upon execution of a rental agreement, is made available to a lessee for the lessee’s use.

Notes on Use

See K.S.A. 50-656 for authority. This act applies only to short-term leases. See K.S.A. 50-655.

129.32

**FALSE, MISLEADING OR OMITTED STATEMENTS
REGARDING COLLISION DAMAGE WAIVERS**

In an action for the deceptive act and practice of making false or misleading statements in connection with *(the sale) (an offer to sell) (an advertisement)* of a collision damage waiver, the *(Plaintiff) (State)* must prove:

1. The Defendant is a *(person) (organization)* in the business of providing rental motor vehicles to the public; *(and)*

(Insert one or more of the following paragraphs)

2. The *(Defendant) (Defendant's officials) (Defendant's representatives)* made a false or misleading statement in connection with the *(sale) (offer to sell) (advertisement)* of a collision damage waiver.

OR

2. The *(Defendant) (Defendant's officials) (Defendant's representatives)* omitted a material statement in connection with the *(sale) (offer to sell) (advertisement)* of a collision damage waiver; and

3. Under the circumstances such statement should have been made in order to make the statements that were made not misleading.

OR

2. The *(Defendant) (Defendant's officials) (Defendant's representatives)* made a statement that the purchase of a collision damage waiver was mandatory.

OR

2. At the time of the sale of a collision damage waiver, the *(Defendant) (Defendant's officials) (Defendant's representatives)* failed to provide proper disclosure that the purchase of a collision damage waiver may be duplicative of the lessee's automobile insurance contract.

OR

2. *(Insert any applicable deceptive act or practice as set forth in PIK 4th 129.02 et seq.)*

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 129.01 and 129.31)

Notes on Use

See K.S.A. 50-658(a) for authority. See K.S.A. 50-656 for definitions. Pursuant to K.S.A. 50-655, this action is applicable only to short term leases (60 days or less).

D. MOTOR VEHICLES AND MOTOR VEHICLE PARTS

129.41

DEFINITIONS

“After market part” means replacement sheet metal or plastic parts which are not made by or for the original equipment manufacturer and which generally constitute the exterior or provide support for the exterior of a motor vehicle, including inner and outer panels.

“Consumer” means the first individual to take title to a motor vehicle, for purposes other than resale, after such vehicle was:

- (A) used as a leased or rented motor vehicle;**
- (B) a driver training motor vehicle;**
- (C) repurchased or reacquired by the manufacturer or distributor as a factory buyback motor vehicle; or**
- (D) returned to a vehicle dealer under the Kansas Lemon Law;**

“Vehicle” means every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, and is required to be registered under Kansas law. “Vehicle” includes micro utility trucks, but does not include motorized bicycles, manufactured homes, or mobile homes.

“Motor vehicle” means a motor vehicle which is registered for a gross weight of 12,000 pounds or less, or a farm truck registered for a gross weight of 16,000 pounds or less.

“Driver training motor vehicle” means an automobile or motorcycle acquired by a board pursuant to an agreement with a motor vehicle manufacturer or dealer for use in driver training courses; but does not include within its meaning any motor vehicle which is rented, leased, or owned by any school district, nonpublic school or community college.

“Leased or rented motor vehicle” does not include a motor vehicle which is leased, loaned or rented by a vehicle dealer to a customer of such dealer while the customer’s motor vehicle is being serviced or repaired by such dealer.

“Factory buyback motor vehicle” means a motor vehicle repurchased or reacquired by the manufacturer or distributor due to an order or judgment by a court of law or formal, informal or mandatory arbitration procedure, and placed for sale through any dealer, auction or agent.

“Vehicle dealer” means any person who for commission, money, or other thing of value, is engaged in the business of buying, selling, or offering or attempting to negotiate a sale of an interest in: (1) vehicles; or (2) motor vehicles

as an auction motor vehicle dealer. “Vehicle dealer” does not include: Insert applicable description of persons excluded from the definition under K.S.A. 8-2401(a) .

“Auction motor vehicle dealer” means any person who for commission, money or other thing of value is engaged in an auction of motor vehicles except that the sales of such motor vehicles shall involve only motor vehicles owned by licensed motor vehicle dealers and sold to licensed motor vehicle dealers, except that any auction motor vehicle dealer, registered as such and lawfully operating prior to June 30, 1980, shall be deemed to be and have been properly licensed under this act from and after July 1, 1980. For the purposes of this definition, an auction is a private sale of motor vehicles where any and all licensed motor vehicle dealers who choose to do so are permitted to attend and offer bids and the private sale of such motor vehicles is to the highest bidder.

Notes on Use

See K.S.A. 50-659, 50-660, 8-2401 and 72-5015 for definitions. Note that a “consumer” is defined differently for purposes of causes of action under K.S.A. 50-659 than it is for actions brought under the Kansas Consumer Protection Act, K.S.A. 50-624.

If it is relevant to the case whether a vehicle was returned to a vehicle dealer under the provisions of the Kansas Lemon Law, see K.S.A. 50-645.

In the appropriate case, the definition of “vehicle” may be supplemented with definitions for “manufactured home” and “mobile home,” found at K.S.A. 58-4202(a) and (b). “Micro utility truck” is defined in K.S.A. 8-126(u).

129.42

FAILURE TO DISCLOSE SPECIFIC FACTS REGARDING VEHICLE

In an action for the deceptive act and practice of failing to disclose that a vehicle was *(used as a driver training motor vehicle) (a leased or rented motor vehicle) (a factory buyback motor vehicle) (returned to a vehicle dealer) (offered for sale, lease or rental by a vehicle dealer)*, the *(Plaintiff) (State)* must prove:

- 1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;**
- 2. Defendant was a vehicle dealer;**
- 3. The Defendant knowingly or intentionally failed to disclose _____ *(insert A or B)* and**
 - A. in writing the fact that a motor vehicle was *(insert one or more of the following)***
 - used as *(a driver training vehicle)***
 - (a leased or rented motor vehicle)***
 - (a factory buyback motor vehicle)***
 - (returned to a vehicle dealer)***
 - B. in a *(solicitation) (advertisement)* offering a motor vehicle for *(sale) (lease) (rental)*, the fact that such motor vehicle was being offered for *(sale) (lease) (rental)* by a vehicle dealer**
- 4. The motor vehicle was *(insert appropriate description based on choice of A or B above)***
 - used as *(a driver training vehicle.)***
 - (a leased or rented motor vehicle.)***
 - (a factory buyback motor vehicle.)***
 - (returned to a vehicle dealer.)***
 - (being offered for (sale,) (lease) (rental) by a vehicle dealer.)***

Failure of a vehicle dealer to disclose in writing that a vehicle was *(used as a driver training vehicle) (a leased or rented motor vehicle) (a factory buyback motor vehicle) (returned to a vehicle dealer)* creates a presumption of intent not to disclose the information. This presumption is overcome if you are persuaded by the evidence that the contrary was true.

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.41)

Notes on Use

See K.S.A. 50-659 and 50-665 for authority. See K.S.A. 50-659(b), 8-2401, and 72-5015 for definitions. Note that a “consumer” is defined differently for purposes of causes of action under K.S.A. 50-659 than it is for actions brought under the Kansas Consumer Protection Act, K.S.A. 50-624.

129.43

**FAILURE TO DISCLOSE USE OF AFTER
MARKET PARTS IN ESTIMATE**

In an action for the deceptive act and practice of failing to make proper disclosure of the use of “after market parts” in an estimate of repair, the (Plaintiff) (State) must prove:

- 1. Defendant prepared an estimate of repair of a motor vehicle;**
- 2. Defendant specified the use of after market parts in the estimate;**
- 3. Defendant did not disclose the intended use of after market parts to the owner by clearly identifying in the written estimate each such part as an after market part and providing a disclosure containing the following information in a 10-point type or larger which appears on or is attached to the owner’s copy of the estimate:**

“THIS ESTIMATE HAS BEEN PREPARED BASED ON THE USE OF ONE OR MORE AFTER MARKET PARTS SUPPLIED BY A SOURCE OTHER THAN THE MANUFACTURER OF YOUR MOTOR VEHICLE. WARRANTIES APPLICABLE TO THESE PARTS ARE PROVIDED BY THE PARTS MANUFACTURER OR DISTRIBUTOR RATHER THAN BY THE MANUFACTURER OF YOUR VEHICLE.”

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.41)

Notes on Use

See K.S.A. 50-662 and 50-663 for authority. See K.S.A. 50-660 for definitions.

E. INVENTION PROMOTION SERVICES

129.51

DEFINITIONS

“Contract for invention promotion services” means a contract by which an invention promoter undertakes to develop or promote an invention for a consumer.

“Fee” means any payment made by a consumer to an invention promoter, including reimbursements for expenditures made or costs incurred.

“Invention” means a process, machine, manufacture, composition of matter, or an improvement upon any of the foregoing.

“Invention promoter” means any person, and the agents, employees or representatives of the person, who develops or promotes or offers to develop or promote an invention for a consumer. The following are not invention promoters:

1. A person licensed to practice before the United States patent and trademark office as a patent attorney;
2. a department or agency of federal, state or local government;
- or
3. a person who accepts technology from institutions of higher education or other state or federal research institutions for evaluation and the providing of marketing services.

“Invention promotion services” means acts to be performed or promised to be performed, or both, by an invention promoter.

“Person” means an individual, partnership, corporation or other legal entity. Such term does not include a department or agency of any governmental unit.

Notes on Use

See K.S.A. 50-666 for authority.

129.52

**SOLICITATION—INVENTION PROMOTOR'S
FAILURE TO DISCLOSE**

In an action for the deceptive act and practice of failing to disclose by an invention promotor in a solicitation, the *(Plaintiff) (State)* must prove:

- 1. Defendant was an invention promoter;**
- 2. Defendant solicited invention promotion business from the *(Plaintiff)*_____ *(Name of consumer)*; and**
- 3. In such solicitation, the Defendant failed to disclose to the *(Plaintiff)*_____ *(Name of consumer)* whether a fee was to be charged for the invention promotion services.**

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01 and 129.51)

Notes on Use

See K.S.A. 50-667(a) and 50-668 for authority. See K.S.A. 50-666 for definitions.

129.53

**CONTRACT—INVENTION PROMOTOR'S
FAILURE TO DISCLOSE**

In an action for the deceptive act and practice of failing to disclose by an invention promotor in a contract, the *(Plaintiff)* *(State)* must prove:

- 1. *(Plaintiff)*_____ *(Name of consumer)* was a consumer;**
- 2. Defendant was an invention promotor;**
- 3. *(Plaintiff)*_____ *(Name of consumer)* and Defendant entered into a contract for invention promotion services; and**
- 4. The Defendant failed to disclose in the contract *(insert one or more of the following)***
 - the fee to be charged for invention promotion services in the contract**
 - the specific services to be provided, including**
 - (whether the promotor would construct one or more prototypes, models or devices embodying the consumer's invention.)***
 - (whether the promotor would undertake to sell or distribute one or more prototypes, models or devices embodying the consumer's invention.)***
 - (the expected completion date of services.)***
 - (extent to which the invention promotor would acquire an interest in the title to the consumer's invention.)***
 - (insert other specific service)***

OR

that the Defendant would or would not evaluate the *(technical)* *(commercial)* feasibility of the invention

OR

that without an evaluation of *(commercial)* *(technical)* feasibility, the Plaintiff was at substantial risk that the invention might not be *(commercially)* *(technically)* feasible.

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01 and 129.51)

Notes on Use

See K.S.A. 50-667(b)(1)-(3) and 50-668 for authority. See K.S.A. 50-666 for definitions. If there is a dispute as to the existence of a contract, see PIK 4th 124.01 *et seq.*

129.54

FAILURE TO INCLUDE REQUIRED DISCLAIMER IN CONTRACT FOR INVENTION PROMOTION SERVICES

In an action for the deceptive act and practice of failing to include a disclaimer in a contract for invention promotion services, the *(Plaintiff)* *(State)* must prove:

- 1. *(Plaintiff)* _____ *(Name of consumer)* was a consumer;**
- 2. Defendant was an invention promoter;**
- 3. *(Plaintiff)* _____ *(Name of consumer)* and Defendant entered into a contract for invention promotion services; and**
- 4. The Defendant failed to include as part of such contract the following statement in 10-point boldface type:**

“IF YOU ASSIGN EVEN A PARTIAL INTEREST IN THE INVENTION TO THE INVENTION PROMOTER, THE INVENTION PROMOTER MAY HAVE THE RIGHT TO ASSIGN OR LICENSE ITS INTEREST IN THE INVENTION, OR MAKE, USE, AND SELL THE INVENTION, WITHOUT YOUR CONSENT AND MAY NOT HAVE TO SHARE THE PROFITS WITH YOU.

YOU ARE ENCOURAGED TO CONSULT WITH A QUALIFIED ATTORNEY BEFORE SIGNING THIS CONTRACT. BY PROCEEDING WITHOUT THE ADVICE OF A QUALIFIED ATTORNEY YOU COULD LOSE ANY RIGHTS YOU MIGHT HAVE IN YOUR INVENTION. THE PERFORMANCE OF THE SERVICES DETAILED IN THE CONTRACT PROVIDES NO GUARANTEE OR PROMISE OF PROFITS, OR THAT YOUR INVENTION WILL BE PURCHASED BY A MANUFACTURER.

THIS CONTRACT DOES NOT PROVIDE ANY PATENT, COPYRIGHT OR TRADEMARK PROTECTION FOR YOUR INVENTION. THE PATENT OFFICE DISCLOSURE PROGRAM IS NOT A PATENT APPLICATION PROCEEDING.

YOUR POTENTIAL PATENT RIGHTS MAY BE ADVERSELY AFFECTED BY ANY ATTEMPT TO COMMERCIALIZE YOUR INVENTION BEFORE A PATENT APPLICATION

COVERING IT IS FILED. NONCONFIDENTIAL DISCLOSURES OF YOUR INVENTION MAY ALSO TRIGGER CERTAIN STATUTORY DEADLINES FOR FILING A PATENT APPLICATION IN THE UNITED STATES AND WOULD PREVENT YOU FROM OBTAINING VALID PATENT RIGHTS IN COUNTRIES WHOSE LAWS PROVIDE THAT PATENT APPLICATIONS MUST BE FILED BEFORE ANY PUBLIC DISCLOSURE.”

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.01 and 129.51)

Notes on Use

See K.S.A. 50-667(b)(4) and 50-668 for authority. See K.S.A. 50-666 for definitions.

F. FOOD ADVERTISING AND SALES PRACTICES

129.61

DEFINITIONS

“Buyer” means both actual and prospective purchasers but does not include persons purchasing for resale.

“Carcass” means any carcass of cattle, sheep, swine, domestic rabbits or goats.

“Food Plan” means any plan offering meat, poultry or seafood for sale or the offering of such product in combination with each other or with any other food or non-food product or service for a single price.

“Misrepresent” means to use any untrue, misleading or deceptive oral or written statement, advertisement, label, display, picture, illustration or sample.

“Person” means individual, partnership, firm, corporation, association or other entity.

“Represent” means to use any form of oral or written statement, advertisement, label, display, picture, illustration or sample.

“Seller” means any person, individual or business entity, corporation, league, franchise, franchisee, franchisor or any authorized representative or agent thereof who offers meat, poultry, seafood, or combinations of such items, for retail purchase to the public.

Notes on Use

See K.S.A. 50-901 for authority.

129.62

BAIT SELLING OF CARCASS OR FOOD PLAN

In an action for the deceptive act and practice of bait selling, the *(Plaintiff)* *(State)* must prove:

1. The Defendant is [(an individual) (a partnership) (a firm) (a corporation) (an association) _____ (insert other entity)] [(advertising) (offering for sale) (selling)] all or part of a (carcass) (food plan); (and)

2. (Insert one or more of the following):

2. The Defendant disparaged or degraded _____ (insert name/description of disparaged product) which was (advertised) (offered for sale) by Defendant in order to induce (Plaintiff) _____ (Name of buyer) to purchase _____ (insert description of other product sold by Defendant).

OR

2. The Defendant displayed (insert name/description of product displayed) (a depiction of insert name/description of product depicted) to (Plaintiff) (Name of buyer) in order to induce (Plaintiff) (Name of buyer) to purchase (insert description of other product) which was not (displayed) (depicted).

OR

2. The Defendant represented that _____ (insert name/description of product) was for sale and the representation was used primarily to sell _____ (insert description of other product).

OR

2. The Defendant, without the (Plaintiff) _____ (Name of buyer)'s written consent, substituted _____ (insert name/description of product) for _____ (insert description of product ordered), the product originally ordered by the (Plaintiff) _____ (Name of buyer).

OR

2. The Defendant represented that _____ (*insert name/description of product*) was available for sale;

3. The Defendant failed to have a sufficient quantity of _____ (*insert name/description of product*) to meet reasonable anticipated demands; and

4. The Defendant failed to disclose fully and conspicuously the available amount of _____ (*insert name/description of product*).

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.61)

Notes on Use

See K.S.A. 50-903(a)(1)-(3) for authority. See K.S.A. 50-901 for definitions. Note that although K.S.A. 50-902 prohibits inaccurate or deceptive advertising of all foods, the actual deceptive practices described in K.S.A. 50-903 are all limited to advertising, offers or sales relating to carcass or food plans. Also note, that the list of deceptive acts and practices set forth in K.S.A. 50-903 is non-exclusive.

129.63

PRICE MISREPRESENTATION OF CARCASS OR FOOD PLAN

In an action for the deceptive act and practice of price misrepresentation, the *(Plaintiff)* *(State)* must prove:

- 1. The Defendant is [*(an individual)* *(a partnership)* *(a firm)* *(a corporation)* *(an association)* _____ *(insert other entity)*] [*(advertising)* *(offering for sale)* *(selling)*] all or part of a *(carcass)* *(food plan)*; *(and)***
- 2. *(Insert one or more of the following)*:**
 - 2. The Defendant used *(a price list)* *(an advertisement)* which was subject to changes without notice;**
 - 3. The *(price list)* *(advertisement)* failed to state that it was subject to changes without notice;**
 - 4. The *(price list)* *(advertisement)* contained prices other than the Defendant's current billing prices; and**
 - 5. The price changes were not subject to the *(Plaintiff)* _____ *(Name of consumer)*'s advance acceptance or rejection at or before the time of order or delivery.**

OR

- 2. The Defendant misrepresented the amount of money that the *(Plaintiff)* _____ *(Name of buyer)* would save on purchases of _____ *(insert product)*, which was not of the same grade or quality as that to which it was compared.**

OR

- 2. The Defendant failed to disclose fully and conspicuously in its advertisement and invoice in at least ten-point type any charge for cutting, wrapping, freezing, delivery or other services.**

OR

- 2. The Defendant offered _____ *(insert product)* for sale in units larger than one pound; and**

**3. The Defendant represented the price of _____
(insert product) in terms other than price per single
pound.**

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.61)

Notes on Use

See K.S.A. 50-903(b)(1)-(4) for authority. See K.S.A. 50-901 for definitions.

129.64

**PRODUCT MISREPRESENTATION OF
CARCASS OR FOOD PLAN**

In an action for the deceptive act and practice of product misrepresentation, the *(Plaintiff) (State)* must prove:

1. The Defendant is [(*an individual*) (*a partnership*) (*a firm*) (*a corporation*) (*an association*) _____ (*insert other entity*)] [(*advertising*) (*offering for sale*) (*selling*)] all or part of a (*carcass*) (*food plan*); and

2. (*Insert one or more of the following*):

2. The Defendant misrepresented the (*cut*) (*grade*) (*brand*) (*trade name*) (*weight*) (*measure*) of _____ (*insert product name/description*).

OR

2. The Defendant used the abbreviation “U.S.” in describing a product not graded by the United States department of agriculture.

OR

2. The Defendant referred to a quality grade other than the United States department of agriculture quality grade; and

3. The grade name was not preceded by the Defendant’s name in type at least as large and conspicuous as the grade name.

OR

2. The Defendant misrepresented _____ (*insert product name/description*) through the use of a term similar to a government grade.

OR

2. The Defendant advertised a yield grade and failed to disclose in uniform ten-point type a definition of the yield grade in the following terms:

Yield Grade 1—Extra lean
 Yield Grade 2—Lean
 Yield Grade 3—Average waste
 Yield Grade 4—Wasty
 Yield Grade 5—Exceptionally wasty

OR

2. The Defendant compared the quality of _____
(insert product name/description) to a United States
 department of agriculture yield grade and did not fully
 and conspicuously disclose that the quality was not a
 U.S.D.A. yield grade but only an opinion.

OR

2. The Defendant [(adverted) (offered)]
 [(carcasses) (sides) (primal cuts)] for sale; and

3. The Defendant *(included disproportionate
 numbers or amounts of less expensive components of
 those cuts) (offered these [carcasses] [sides] [primal cuts]
 in tandem with less expensive components from other
 [carcasses] [sides] [primal cut parts]).*

OR

2. The Defendant failed to disclose fully and
 conspicuously the correct government grade for _____
(insert product name/description) which it represented
 as having been graded.

OR

2. The Defendant advertised *(a carcass) (part of a
 carcass)* for sale; and

3. _____ *(Insert one or both of the following):*

*(The Defendant failed to disclose fully
 and conspicuously that the yield of
 consumable meat from (the carcass) (this
 part of the carcass) would be less than
 the weight of (the carcass) (this part of
 the carcass).)*

*(The Defendant failed to include in the
 advertisement the following disclosure,
 used separately and distinctly for each
 (carcass) (part of a carcass) so advertised,*

in at least ten-point type: “Sold gross weight subject to trim loss.”)

OR

2. The Defendant misrepresented the amount or proportion of retail cuts that a carcass or part of carcass would yield.

OR

2. The Defendant failed to disclose fully and conspicuously whether a quarter of a carcass is the front or hind quarter and that quarters, sides or halves consisted of only anatomically natural proportions of cuts from front or hind quarters.

OR

2. The Defendant represented a carcass to be a “half” or “side” when in fact it did not consist exclusively of a front and hind quarter from the same side of the same animal; and

3. The Defendant did not disclose fully and conspicuously that the front and hind quarter were or might be from different sides or different animals.

OR

2. The Defendant advertised and offered for sale a section of a carcass either as an individual unit or as an inclusion with the purchase of a (*quarter*) (*side*) (*half*); and

3. The Defendant failed to describe and call the section by its commonly known name.

OR

2. The Defendant advertised and offered for sale a (*half*) (*side*) of a carcass; and

3. Each quarter of the carcass was not of the same grade or quality as the other quarter comprising the (*half*) (*side*).

OR

2. The Defendant advertised and offered for sale a *(quarter) (half) (side)* of a carcass; and

3. *(Insert one or more of the following):*

(The Defendant did not advise the *(buyer) (Plaintiff)* of the weight of each quarter prior to sale.)

(The Defendant did advise the *(buyer) (Plaintiff)* of the weight of each quarter prior to sale but used approximate weights because the actual weights of each quarter were not known or could not be determined prior to sale, but the *(Plaintiff) (buyer)* was not informed that *(insert one or more of the following)*

(the weights were approximate.)

(The advertised weight ranges covered a spread of more than 10%.)

(The difference between advertised and sale weights exceeded 5%.)

(The Defendant did not agree with the *(Plaintiff) (buyer)*, in writing, to make a cash refund or grant a credit on delivery for the difference between actual weight and the approximate weight on which the sale was made.)

OR

2. The Defendant used the word(s) *(bundle) (sample order)* _____ *(insert words of similar import)* to describe a quantity of meat or poultry but the Defendant did not itemize each type of cut and the weight of each type of cut which the *(buyer) (Plaintiff)* would receive.

OR

2. The Defendant *(advertised) (offered)* a free, bonus or extra product or service combined with or conditioned on the purchase of any other product or service; and

3. The Defendant failed to _____ *(insert one or both of the following)*

(accurately describe the *(grade) (net weight) (measure) (type) (brand) (trade name)* _____

(insert other inaccurate description) of the free, bonus or extra product or service.)
(clearly and conspicuously set forth the total price or amount which must be purchased to entitle the *(buyer)* *(Plaintiff)* to the additional product or service.)

OR

2. The Defendant misrepresented the *(breed)* *(origin)* *(diet)* of slaughtered animals or parts of slaughtered animals offered for sale.

OR

2. The Defendant made a claim as to the *(breed)* *(origin)* *(diet)* of slaughtered animals or parts of slaughtered animals offered for sale; and

3. The Defendant did not have written records available to substantiate the claims.

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.61)

Notes on Use

See 50-903(c)(1)-(15) for authority. See K.S.A. 50-901 for definitions.

129.65

REQUIRING PURCHASE OF FOOD FREEZER

In an action for the deceptive act and practice of requiring the purchase of a food freezer, the *(Plaintiff) (State)* must prove:

1. The Defendant is [(an individual) (a partnership) (a firm) (a corporation) (an association) _____ (insert other entity)] [(advertising) (offering for sale) (selling)] all or part of a (carcass) (food plan); and

2. The Defendant required the purchase of (a food freezer) _____ (insert description of other food storage refrigeration unit) from (the Defendant) (a specified supplier) as a prerequisite to, or a necessary part of, any food plan.

For purposes of this instruction, the following definitions apply:

(Insert applicable definitions from PIK 4th 129.61)

Notes on Use

See K.S.A. 50-903(d) for authority. See K.S.A. 50-901 for definitions.

G. CREDIT SERVICE ORGANIZATIONS

129.81

DEFINITIONS

“Commissioner” means the state bank commissioner or, if designated by the commissioner, the deputy commissioner, of the consumer and lending division of the office of the state bank commissioner.

“Consumer” means an individual who is a resident of this state.

“Credit services organization” means a person that engages in, or holds out to the public as willing to engage in, the business of debt management services for a fee, compensation, or gain, or in the expectation of a fee, compensation, or gain.

“Debt management service” means:

- 1. receiving or offering to receive funds from a consumer for the purpose of distributing the funds among such consumer’s creditors in full or partial payment of such consumer’s debts;**
- 2. improving or offering to improve a consumer’s credit record, history, rating, or score; or**
- 3. negotiating or offering to negotiate to defer or reduce a consumer’s obligations with respect to credit extended by others.**

“Insolvent” means a person whose debts exceed the person’s assets.

“Law firm” means a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

“Licensee” means a person who is licensed by the commissioner as a credit services organization.

“Nationwide mortgage licensing system and registry” means a mortgage licensing system developed and maintained by the conference of state bank supervisors and the American association of residential mortgage regulators for the licensing and registration of licensed mortgage loan originators and other financial services providers.

“Person” means any individual, corporation, partnership, association, unincorporated organization or other form of entity, however organized, including a nonprofit entity.

“Trust account” means an account established by the applicant or licensee in a federally insured financial institution used to hold funds paid by

consumers to a credit services organization with a designation indicating the funds in the account are:

- 1. not funds of the applicant or licensee or its owners, officers, or employees; and**
- 2. unavailable to creditors of the applicant or licensee.**

Notes on Use

For authority, see K.S.A. 50-1117.

An individual licensed to practice law in this state acting within the scope of the individual's practice as an attorney, and the individual's law firm, are exempt from the provisions of the Credit Services Organization Act. K.S.A. 50-1116(b).

129.82

**FAILURE OF A CREDIT SERVICES ORGANIZATION
TO PERFORM REQUIRED DUTIES**

In an action for the deceptive act and practice of failure to perform required duties the *(Plaintiff) (State)* must prove:

- 1. that the defendant is a credit services organization engaged in or holding itself out as willing to engage in debt management services with a resident of Kansas; and**
- 2. that the defendant failed to obtain licensing with the state bank commissioner.**

OR

- 1. that the defendant is a credit services organization engaged in debt management services; and**
- 2. *(Insert one or more of the following paragraphs):*
[that the defendant failed to provide the consumer with a credit education program designed to improve financial literacy of the consumer;]**

OR

[that the defendant failed to take reasonable steps to identify all creditors of a consumer;]

OR

[that the defendant failed to provide the consumer with a written financial analysis of an initial budget plan for all of the consumer's debt obligations which the consumer can reasonably meet;]

OR

[that the defendant failed to provide the consumer with a list of each creditor expected to participate in the debt management services agreement and each creditor not expected to participate in the debt management services agreement;]

OR

[that the defendant failed to enter into a written debt management services agreement with the consumer or failed to provide a copy of the signed agreement to the consumer;]

OR

[that the defendant failed to provide the following notice in the written agreement: “The Kansas Office of the State Bank Commissioner will accept questions and complaints from consumers regarding the registrant at 700 SW Jackson, Suite 300, Topeka, Kansas, 66603, or by calling toll-free 1-800-387-8523.”]

OR

[that the defendant failed to (maintain separate records of account for each consumer) (disburse funds paid by or on behalf of a consumer to creditors within 10 calendar days after receipt of funds) (correct misdirected payments resulting from any defendant’s error) (reimburse consumer for any actual fees or other charges imposed by a creditor as a result of misdirections) (disburse consumer’s funds from the trust account only to consumer’s creditors or back to the consumer);]

OR

[that the defendant failed to refund funds held in the trust account to the consumer within 10 calendar days from receipt of rescission of the debt management services agreement;]

OR

[that the defendant commingled consumers’ trust accounts with defendant’s operating accounts.]

Notes on Use

For authority, see K.S.A. 50-1118, K.S.A. 50-1120(a), (b), and (c), and K.S.A. 50-1122.
See also K.S.A. 50-1117(i) for the definition of “trust account.”

129.83

**FAILURE OF A CREDIT SERVICES ORGANIZATION
TO PROVIDE DISCLOSURE STATEMENTS**

In an action for the deceptive act and practice of failure to provide disclosure statements, the *(Plaintiff) (State)* must prove:

1. that the defendant is a credit services organization engaged in debt management services; and

2. *(Insert one or more of the following paragraphs):*

[that the defendant failed to disclose in the written debt management services agreement that the defendant may receive compensation from the consumer's creditors for providing debt management services;]

OR

[that the defendant failed to disclose in the written debt management services agreement that the defendant may not, as a condition of entering into a debt management services agreement, (require a consumer to purchase any other product or service) (solicit or offer to sell any other product or service to the consumer during the term of the debt management services agreement);]

OR

[that the defendant failed to disclose in the written debt management services agreement that the defendant may not require a voluntary contribution from a consumer for any service provided by the defendant;]

OR

[that the defendant failed to disclose in the written debt management services agreement that by signing the agreement the consumer authorizes any financial institution in which the defendant has established a trust account for the deposit of the consumer's funds to disclose to the commissioner financial records relating to the trust account;]

Notes on Use

For authority, see K.S.A. 50-1120(c)(7), (8), (9), and (10).

129.84

**WRONGFUL CHARGING FOR SERVICES BY A
CREDIT SERVICES ORGANIZATION**

In an action for the deceptive act and practice of wrongful charging for credit services, the *(Plaintiff)* *(State)* must prove:

- 1. that the defendant is a credit services organization; and**
- 2. *(Insert one or more of the following paragraphs)***
[that the defendant delayed payment of a consumer's debt for the purpose of increasing interest, costs, fees or charges payable by the consumer;]

OR

[that the defendant received compensation for rendering debt management services where the defendant has acted as a creditor of the consumer;]

OR

[that the defendant received or charged a fee in the form of a promissory note or other promise to pay;]

OR

[that the defendant accepted or received a reward, bonus, premium, commission or other consideration for referring a consumer to any person;]

OR

[that the defendant entered into a debt management services agreement with a consumer and charged an additional fee to (prepare a financial analysis) (prepare an initial budget plan) (counsel a consumer about debt management) (provide a consumer with a consumer education program required by the commission) (rescind a debt management services agreement);]

OR

[that defendant required a voluntary contribution from a consumer for services provided to the consumer;]

OR

[that defendant required, as a condition of entering into a debt management services agreement, the consumer to purchase for a fee a counseling session, an educational program or materials or supplies.]

Notes on Use

For authority, see K.S.A. 50-1121(a), (g), (k), and (l) and K.S.A. 50-1126(d).

129.85**FALSE OR MISLEADING REPRESENTATIONS OR ADVICE BY A
CREDIT SERVICES ORGANIZATION**

In an action for the deceptive act and practice of false or misleading representations or advice by a credit services organization, the *(Plaintiff)* *(State)* must prove:

- 1. that the defendant is a credit services organization; and**
- 2. *(Insert one or more of the following paragraphs)***
[that the defendant made or used false or misleading representations in the offer or sale of its services;]

OR

[that the defendant engaged, directly or indirectly, in a fraudulent or deceptive act, practice or course of business, *i.e.*, with the offer or sale of its services;]

OR

[that the defendant made, or advised a consumer to make, a statement with respect to the consumer's credit worthiness, credit standing or credit capacity (that is false or misleading) (that should be known by the exercise of reasonable care to be false or misleading) to a consumer reporting agency or to a person who has extended credit to a consumer or to whom a consumer is applying for an extension of credit;]

OR

[that defendant advertised or caused to be advertised the services of a Kansas credit services organization without obtaining proper licensure from the commissioner;]

OR

[that defendant transferred, assigned, or attempted to transfer or assign, a license to another person;]

OR

[that defendant conducted credit services organization activities using a name or names not approved by the commissioner;]

OR

[that defendant used any communication which simulates a legal or judicial process or which gives the false appearance of being authorized or approved by a government, governmental agency, or attorney-at-law.]

Notes on Use

For authority, see K.S.A. 50-1121(b), (c), (d), (e), (f), (h), (i), and (s).

129.86**WRONGFUL ACTIONS BY A CREDIT
SERVICES ORGANIZATION**

In an action for the deceptive act and practice of wrongful actions by a credit services organization, the *(Plaintiff) (State)* must prove:

- 1. that the defendant is a credit services organization; and**
- 2. *(Insert one or more of the following paragraphs)*
[that defendant operated as a collection agency;]**

OR

[that defendant gave a reward, bonus, premium, commission or other consideration for the referral of a consumer to the defendant's credit services organization business and charged the consumer for the amount;]

OR

[that defendant lent money or provided credit to a consumer;]

OR

[that defendant structured a debt management service agreement that would result in the negative amortization of any of consumer's debts;]

OR

[that defendant charged for or provided credit insurance;]

OR

[that defendant purchased a debt or obligation of a consumer;]

OR

[that the defendant or a director, manager, or officer of defendant became a director, manager, officer, or

**owner of any creditor or subsidiary of any creditor
that is receiving or will receive payments from the
defendant on behalf of a consumer;]**

OR

**[that defendant attempted to cause a consumer to
waive or agree to forego rights or benefits under
the Kansas Consumer Protection Act, specifically
insert rights or benefits.]**

Notes on Use

For authority, see K.S.A. 50-1121(j), (m), (n), (p), (q), (r), (t), and (u).

130.01**ADJUDICATION OF MENTALLY ILL PERSONS**

The petitioner alleges that _____ is a mentally ill person subject to involuntary commitment for care and treatment.

To establish this, the petitioner must prove by clear and convincing evidence that the proposed patient:

- 1. Is mentally ill; and**
- 2. Lacks capacity to make an informed decision concerning treatment; and**
- 3. Is likely to cause harm to self or others; and**
- 4. Has a diagnosis that is not solely one of the following disorders:**

Alcohol or chemical substance abuse; antisocial personality disorder; intellectual disability; organic personality syndrome; or, an organic mental disorder.

Notes on Use

For authority, see K.S.A. 59-2945 *et seq.*

K.S.A. 59-2960 provides that a trial pursuant to this act may be consolidated with the trial provided for in the act for obtaining a guardian and conservator.

PIK 4th 102.11, Burden of Proof—Clear and Convincing, should be given with this instruction.

Comment

K.S.A. 59-2945 *et seq.* provides for the involuntary treatment of a “mentally ill person subject to involuntary commitment for care and treatment.” There are no statutory definitions for the disorders listed in paragraph four of the instruction. Those definitions, which are generally accepted by the psychiatric disciplines, can be found in the Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association, (DSM-IV, 4th Ed., 1994).

130.02

MENTAL ILLNESS—DEFINITIONS

In interpreting PIK 4th 130.01, the following definitions are to be considered:

“Mentally ill person” means any person who is suffering from a mental disorder that is manifested by a clinically significant behavioral or psychological syndrome or pattern and associated with either a painful symptom or impairment in one or more important areas of functioning, and involving substantial behavioral, psychological or biological dysfunction, to the extent that the person is in need of treatment.

“Lacks capacity to make an informed decision concerning treatment” means that the person, by reason of the person’s mental disorder, is unable, despite conscientious efforts at explanation, to understand basically the nature and effects of hospitalization or treatment or is unable to engage in a rational decision-making process regarding hospitalization or treatment, as evidenced by the inability to weigh the possible risks and benefits.

“Likely to cause harm to self or others” means that the person, by reason of the person’s mental disorder: (a) is likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others or substantial damage to another’s property, as evidenced by behavior threatening, attempting or causing such injury, abuse or damage; except that if the harm threatened, attempted or caused is only harm to the property of another, the harm must be of such a value and extent that the state’s interest in protecting the property from such harm, outweighs the person’s interest in personal liberty; or, (b) is substantially unable, except for reason of indigency, to provide for any of the person’s basic needs, such as food, clothing, shelter, health or safety, causing a substantial deterioration of the person’s ability to function on the person’s own.

Notes on Use

For authority, see K.S.A. 59-2946.

130.03

**ADJUDICATION OF ADULT WITH AN IMPAIRMENT IN NEED
OF A GUARDIAN OR CONSERVATOR**

The sole issue for you to determine in this case is whether _____ is an adult with an impairment in need of a guardian or a conservator, or both, as that term is defined in this instruction. If you so find, then the court may appoint a guardian of *(his) (her)* person and a conservator to manage *(his) (her)* affairs.

A person is presumed to be competent, but that presumption may be overcome by evidence establishing that the person is an adult with an impairment in need of a guardian or conservator, or both.

The term “adult with an impairment in need of a guardian or a conservator, or both” means a person whose ability to receive and evaluate relevant information, or to effectively communicate decisions, or both, even with the use of assistive technologies or other supports, is impaired such that the person lacks the capacity to manage such person’s estate, or to meet essential needs for physical health, safety, or welfare, and who is in need of a guardian or a conservator, or both.

The term “in need of a guardian” means a person who because of both an impairment and the lack of appropriate alternatives for meeting essential needs, requires the appointment of a guardian.

The term “in need of a conservator” means a person who because of both an impairment and the lack of appropriate alternatives for managing such person’s estate, requires the appointment of a conservator.

The phrase “meet essential needs for physical health, safety, or welfare” means making those determinations and taking those actions which are reasonably necessary in order for a person to obtain or be provided with shelter, sustenance, personal hygiene or health care, and without which serious illness or injury is likely to occur.

Notes on Use

For authority, see K.S.A. 59-3050 *et seq.*

K.S.A. 59-3067 provides that a trial pursuant to this act may be consolidated with the trial provided for in the care and treatment act for mentally ill persons, or with the trial provided for in the care and treatment act for persons with an alcohol or substance abuse problem.

K.S.A. 59-3051(a) provides that no person who is being treated by prayer in the practice of the religion of any church which teaches reliance on spiritual means alone through prayer for healing shall be determined to be an adult with an impairment in need of a guardian for that reason alone, nor considered to lack the capacity to meet essential needs for physical health, safety or welfare because of such person's reliance upon such treatment.

PIK 4th 102.11, Burden of Proof—Clear and Convincing, should be given with this instruction.

130.04**DEFINITIONS**

In interpreting PIK 4th 130.03, the following definitions are to be considered:

“Appropriate alternative” means any program or service, or the use of a legal device or representative, which enables a person with an impairment to adequately meet essential needs for physical health, safety or welfare, or to reasonably manage such person’s estate. Appropriate alternatives may include, but are not limited to, a power of attorney, a durable power of attorney, a power of attorney for health care decisions, a living will, a trust, a joint tenancy or a representative payee.

“Manage such person’s estate” means making those determinations and taking those actions which are reasonably necessary in order for a person to receive and account for personal or business income, benefits and property, whether real, personal or intangible, and except for reasons of indigency, to purchase or otherwise obtain necessary goods or services, to pay debts and expenses, to sell, exchange or otherwise dispose of property, and to plan for future accumulation, conservation, utilization, investment, and other disposition of financial resources.

Notes on Use

For authority, see K.S.A. 59-3051.

130.20

SEXUAL PREDATOR/CIVIL COMMITMENT

The State alleges the respondent is a sexually violent predator. The respondent denies the allegation. To establish this charge, each of the following claims must be proved:

1. That the respondent has been (*convicted of*) (*charged with*) _____, a sexually violent offense;
2. That the respondent suffers from a (*mental abnormality*) (*personality disorder*) which makes the respondent likely to engage in repeat acts of sexual violence; and
3. That the respondent's (*mental abnormality*) (*personality disorder*) makes it seriously difficult for (*him*) (*her*) to control (*his*) (*her*) dangerous behavior.

OR

1. That the respondent has been convicted of _____;
2. That the crime was sexually motivated;
3. That the respondent suffers from a (*mental abnormality*) (*personality disorder*) which makes the respondent likely to engage in repeat acts of sexual violence; and
4. That the respondent's (*mental abnormality*) (*personality disorder*) makes it seriously difficult for (*him*) (*her*) to control (*his*) (*her*) dangerous behavior.

Notes on Use

For authority, see K.S.A. 59-29a01 *et seq.* The first alternative should be used when the crime is specifically listed as a sexually violent offense under K.S.A. 59-29a02(e)(1) through (e)(12). The second alternative should be used when the crime is not specifically listed, but is alleged to be sexually motivated under K.S.A. 59-29a02(e)(13).

The person subject to commitment, the attorney general, or the court has a right to demand a jury trial comprised of twelve jurors, unless the parties agree in writing, with the approval of the court, to a lesser number. K.S.A. 59-29a06.

The jury shall be instructed in the concluding instruction that the verdict must be unanimous. See PIK 4th 181.08.

Comment

Although the Kansas Sexually Violent Predator Act (KSVPA) is considered a civil proceeding, it contains many similarities with a criminal prosecution. The KSVPA involves the attorney general as the state's attorney, the respondent has a right of jury trial, the verdict must be unanimous, and the evidentiary burden is beyond a reasonable doubt. Further, the respondent is entitled to a probable cause hearing, is entitled to appointed counsel, and risks confinement in the custody of the Secretary of Social and Rehabilitation Services. *In re Care & Treatment of Foster*, 280 Kan. 845, 853-54, 127 P.3d 277 (2006).

The *Foster* court found reversible error when the state's attorney, in the opening statement, advised the jury that a multidisciplinary team of professionals, a team of prosecutors, and the judge had previously reviewed the case and determined that it should proceed to trial. The court held that telling the jury this information was attorney misconduct, extremely prejudicial, and denied the respondent his right to fair trial. *Id.*, 280 Kan. at 857-58. In accord see *In re Care & Treatment of Ward*, 35 Kan. App. 2d 356, 131 P.3d 540 (2006) (finding reversible error when the state's attorney in a KSVPA commitment proceeding appealed to juror's personal fears for the safety of their own children and the community's children).

Foster further held that, absent a stipulation by the parties, direct or indirect evidence concerning any polygraph examination performed upon the respondent, and any opinions based upon those results, are inadmissible. 280 Kan. at 862-63.

In the case of *In re Care & Treatment of Searcy*, 274 Kan. 130, 49 P.3d 1 (2002), the Kansas Supreme Court reversed the respondent's commitment as a sexually violent predator by finding that the respondent was not brought to trial within 60 days after the K.S.A. 59-29a05 probable cause determination. The decision held that the 60-day time limit was jurisdictional, mandatory, and analogous to the statutory right to speedy trial in criminal cases. In 2003, the legislature amended the Sexually Violent Predator Act to provide that none of the time limits in the Act are intended now or ever were intended to be mandatory or to otherwise affect the district court's subject matter jurisdiction over commitment proceedings.

The 2003 amendments to the Act were considered by the Kansas Court of Appeals in *In re Care & Treatment of Hunt*, 32 Kan. App. 2d 344, 82 P.3d 861 (2004), *rev. denied* 278 Kan. 844 (2004), which found no due process violation in the retroactive application of the amendments. The court further held that because the 60 day time limit of K.S.A. 59-29a06 is now directory and not mandatory, the failure to bring a respondent to trial within 60 days of the determination of probable cause does not divest the district court of subject matter jurisdiction in any properly commenced proceedings.

In *In re Care & Treatment of Hay*, 263 Kan. 822, 953 P.2d 666 (1998), the Kansas Supreme Court extensively examined the Sexually Violent Predator Act. The court held that the Act was not overly broad, did not violate due process or equal protection, and did not constitute cruel and unusual punishment. Additional claims that the Act violated the privilege against self-incrimination and the prohibition against double jeopardy or ex post facto laws were similarly rejected.

The Kansas Supreme Court in *In re Care & Treatment of Miller*, 289 Kan. 218, 210 P.3d 625 (2009) stated that neither *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006), nor K.S.A. 60-455 govern admission of prior acts evidence in sexually violent predator commitment proceedings. See also *In re Care & Treatment of Colt*, 289 Kan. 234, 211 P.3d 797 (2009).

The use of the word "likely" in the KSVPA's definition of "sexually violent predator" does not establish a lesser burden of proof in civil commitment cases than is required under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *In re Care & Treatment of Ward*, 35 Kan. App. 2d 356, 131 P.3d 540 (2006).

130.21

SEXUAL PREDATOR/CIVIL COMMITMENT—DEFINITIONS

The following definitions of words and phrases are applicable in this proceeding:

“Mental abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

“Likely to engage in repeat acts of sexual violence” means the respondent’s propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.

[“Sexually motivated” means that one of the purposes for which the respondent committed the crime was the respondent’s sexual gratification.]

Notes on Use

For authority, see K.S.A. 59-29a02. The bracketed definition should only be given when that is an allegation for the jury to decide.

The term “personality disorder” is not defined by the statute. For a psychiatric definition, see American Psychiatric Ass’n., *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV, 4th Ed., 1994). The constellation of various conditions recognized by the American Psychiatric Association as constituting personality disorders make impossible a pattern definition. Notwithstanding, the Committee does recommend that the trial judge fashion an appropriate definitional instruction based upon the specific diagnosis stated in the American Psychiatric Association manual.

130.22

**SEXUAL PREDATOR/CIVIL COMMITMENT—
BURDEN OF PROOF**

The State has the burden to prove its claims in this case. The respondent is not required to disprove the State's claims. The test you must use is this: If you have a reasonable doubt about the truth of any of the claims that the State must prove, you must find for the respondent. If you have no reasonable doubt about the truth of each of the claims that the State must prove, you should find for the State.

Notes on Use

For authority, see K.S.A. 59-29a07.

Comment

This instruction was cited with approval in *In re Care & Treatment of Thomas*, 301 Kan. 841, 348 P.3d 576 (2015).

131.01

INTRODUCTORY INSTRUCTION

_____ (*Insert name of condemnor*) has in this proceeding through its lawful power of eminent domain taken (*property*) (*an interest in property*) for a public use. Your duty is to determine the amount of compensation that should be paid the owner for the taking.

Notes on Use

This introductory instruction should be adapted for use in every condemnation case.

Comment

An appeal may be taken from the appraisers' award by the condemnor, landowner, or other interest-holder. When an appeal is taken the effect is to bring to the district court the question of the sufficiency of the award. The trial of that issue is heard de novo. K.S.A. 26-508.

If a dispute arises concerning the allocation of the total award made by a jury, K.S.A. 26-517 provides that the district court shall thereafter determine the final distribution among competing interests.

A limited participation by a lessee in jury trial concerning the value of the whole of the property may occur in appropriate circumstances. *City of Manhattan v. Kent*, 228 Kan. 513, 618 P.2d 1180 (1980).

In an inverse condemnation proceeding, whether there has been a compensable taking of property is a question of law for the trial judge. *Garrett v. City of Topeka*, 259 Kan. 896, 916 P.2d 21 (1996). A ruling on this issue should be made in advance of trial.

Regulatory takings that may be subject to inverse condemnation proceedings include physical, title, and economic takings. *Garrett v. City of Topeka*, 259 Kan. 896, 916 P.2d 21 (1996).

The measure of damages for a partial taking in an inverse condemnation proceeding is the difference between the value of the entire property immediately before the taking and the value of that portion of the property remaining immediately after the taking. *Garrett v. City of Topeka*, 259 Kan. 896, 916 P.2d 21 (1996).

In *Woods v. Unified Gov't of Wyandotte County/KCK*, 294 Kan. 292, 275 P.3d 46 (2012), the appellant sought to have the 30-day appeal time enlarged. In denying the request, the Supreme Court affirmed a prior ruling that an eminent domain proceeding is a special statutory proceeding that is not a civil action covered by the Kansas Code of Civil Procedure. The court noted that the result of the case in *In re Condemnation of Land v. Stranger Valley Land Co.*, 280 Kan. 576, 578, 123 P.3d 731 (2005), a case involving a prior version of K.S.A. 26-508 and holding that a district court did not have jurisdiction to enlarge the time for filing a notice of appeal in an eminent domain proceeding, was still valid.

131.02

BURDEN OF PROOF

The Committee recommends that there be no instruction on burden of proof.

Comment

The general doctrine of burden of proof is not applicable to a condemnation proceeding and it is better that such instruction not be given. *City of Wichita v. Jennings*, 199 Kan. 621, Syl. ¶ 6, 433 P.2d 351 (1967).

In *City of Wichita v. May's Company, Inc.*, 212 Kan. 153, 510 P.2d 184 (1973), the court affirmed the elimination of burden of proof doctrine, stating, “[i]n a trial of a condemnation appeal, neither party is charged with the burden of proof, but they share an equal duty and responsibility to supply competent evidence upon which a verdict can be based.”

131.03

MEASURE OF COMPENSATION—TAKING OF ENTIRE TRACT

The measure of compensation you are to award to the owner is the fair market value of the *(property) (interest in property)* at the time of the taking. The date of the taking was _____.

Your award of compensation must fall within the range of testimony as to the fair market value of the *(property) (interest in property)* at the time of the taking.

In determining the amount of compensation you award to the owner, you should consider all of the circumstances shown by the evidence that reasonably bear on the issue of fair market value including the following factors:

[List the applicable statutory factors from K.S.A. 26-513(d)].

The above factors are not to be considered as separate items of damages, but are to be considered only as they affect the fair market value of the property.

Notes on Use

The date of taking is the date the appraisers' award is paid into court under K.S.A. 26-507(a).

The third paragraph of this instruction may recite those statutory factors in K.S.A. 26-513(d) which are shown by the evidence, or such factors as the court may decide are more descriptive and tailored to the evidence presented.

Instructing the jury that its finding “must fall within the range of testimony as to the fair market value” implements *Mettee v. Kemp*, 236 Kan. 781, 696 P.2d 947 (1985), and works well when all opinion evidence of value is based upon comparable sales and uses the unit rule. Because of the 1999 amendment to K.S.A. 26-513(e), however, there may be cases in which use of this language may be inappropriate. The amendment permits fair market value to be determined “by the use of comparable sales, cost or capitalization of income appraisal methods or any combination of such methods.” *Creason v. Unified Gov’t of Wyandotte County*, 272 Kan. 482, 33 P.3d 850 (2001), held admissible expert testimony using the capitalization of income method to determine the value of a gas well even though the expert was not qualified to testify about land values generally and could not give an opinion about the unit fair market value of the property. When the testimony of such an expert is admitted, it may provide a basis for a jury award outside the range of testimony given by appraisers who relied upon some other method of valuation, such as comparable sales alone, to derive a value.

Comment

Improvements upon the land, although not to be valued separately, are to be considered in ascertaining market value. *Hoy v. Kansas Turnpike Authority*, 184 Kan. 70, 334 P.2d 315 (1959). Minerals may not be valued separately. *Reiter v. State Highway Commission*, 177 Kan. 683, 281 P.2d 1080 (1955).

The unit rule in *Hoy* is applicable whenever the market data approach of appraisal is employed. The depreciated replacement cost method or the capitalization of income method do not require the application of the unit rule. *Ellis v. City of Kansas City*, 225 Kan. 168, 589 P.2d 552 (1979).

The 1999 amendment to K.S.A. 26-513(e) provides that fair market value “shall be determined by use of the comparable sales, cost or capitalization of income appraisal methods or any combination of such methods.” The comparable sales method no longer is the preferred method of valuing property. *Creason v. Unified Gov’t of Wyandotte County*, 272 Kan. 482, 33 P.3d 850 (2001); *City of Wichita v. Eisenring*, 269 Kan. 767, 7 P.3d 1248 (2000).

Although expert testimony may be admitted which relates solely to the future income potential of the property, an aspect of the “unit rule” nevertheless remains effective to provide that an award of compensation must reflect the value of the property as a whole. *Creason v. Unified Gov’t of Wyandotte County*, 272 Kan. 482, Syl. ¶ 5, 33 P.3d 850 (2001). There is an important distinction between the measure of value and the evidence admissible to prove it. The award of just compensation cannot assign separate values to component parts of the property, such as by giving one value to the land, another value to the water rights, and another to the mineral rights. However, to demonstrate how the value of the property as a whole is enhanced by a natural asset, evidence can be introduced of its separate value. *Id.*, Syl. ¶ 4.

In *City of Olathe v. Stott*, 253 Kan. 687, 861 P.2d 1287 (1993), the court held that the jury properly followed the jury instruction, which was based on PIK 2d 11.03 [PIK 4th 131.03], when it reduced the value of the property by 10% due to contamination.

The jury’s findings as to the “before” and “after” value of the property taken must fall within the range of the opinion testimony. This includes the opinion testimony of the landowner as to value. *Mettee v. Kemp*, 236 Kan. 781, 696 P.2d 947 (1985). Additur or remittitur is not an appropriate remedy in an eminent domain proceeding where the jury’s finding of “after” value is outside the range of the opinion testimony; the trial court must grant a motion for new trial. *In re Condemnation of Land for State Highway Purposes*, 269 Kan. 128, 3 P.3d 1268 (2000).

The court has an obligation to initially determine the relevancy of a prior sale being urged as a comparable sale. The court should consider such factors as: whether the prior sale was a bona fide and voluntary arm’s length transaction; whether the prior sale was too remote in time; and whether the conditions of the previously sold property and surrounding area are sufficiently similar to the condemned land. *Mooney v. City of Overland Park*, 283 Kan. 617, 153 P.3d 1252 (2007).

Considerable discretion is vested in the trial court in an eminent domain proceeding in admitting or rejecting evidence of value, and the latitude accorded to the parties in bringing out collateral and cumulative facts to support value estimates is left largely to the discretion of the trial court. *Butler County Rural Water Dist. No. 8 v. Yates*, 275 Kan. 291, 64 P.3d 357 (2003).

The only issue on an appeal from a condemnation award is the fair market value of the property taken, and the court’s authority does not extend beyond that which is conferred by statute. As such, the court has no jurisdiction to address constitutional issues or attorney fees claimed. *Miller v. Bartle*, 283 Kan. 108, 150 P.3d 1282 (2007).

A property owner’s opinion as to the fair market value of the owner’s land is relevant to the determination of the issue of fair market value. However, a property owner may not testify using an appraisal method for which the property owner has not been established as an expert. *Manhattan Ice and Cold Storage, Inc. v. City of Manhattan*, 294 Kan. 60, 274 P.3d 609 (2012); and *In re Acquisition of Property by Eminent Domain*, 299 Kan. 37, 320 P.3d 955 (2014).

131.04

MEASURE OF COMPENSATION—PARTIAL TAKING

Only part of the owner's (*property*) (*interest in property*) was taken in this proceeding. The property taken was (*description of property taken*), leaving the owner with (*description of property remaining*). The measure of compensation you should award under these circumstances is the difference between the fair market value of the entire property immediately before the taking and the value of the property remaining with the owner immediately after the taking. The date of taking was _____.

To arrive at a proper award in this proceeding, your first obligation is to determine the fair market value of the entire property immediately before the taking. Your finding must fall within the range of testimony about the fair market value immediately before the taking.

Next, determine the value of the property remaining with the owner immediately after the taking. Your finding must fall within the range of testimony about the value immediately after the taking.

Finally, subtract your finding of the value of the property remaining immediately after the taking from your finding of the fair market value of the entire property immediately before the taking. The difference is the amount of your award.

In determining the amount of compensation you award to the property owner, you must consider all of the circumstances shown by the evidence that reasonably bear on the issue of value of the property, including the following factors:

[List the applicable statutory factors from K.S.A. 26-513(d)].

The above factors are not to be considered by you as separate items of damage, but are to be considered only as they affect the value of the property.

Notes on Use

The fifth paragraph of this instruction should recite those statutory factors in K.S.A. 26-513(d) which are shown by the evidence or such factors as the court and counsel may decide would be more descriptive and tailored to the evidence presented. An additional recognized factor not included in the statute's non-exclusive list, but appropriate in most cases, is any other evidence which a buyer or seller would consider in determining a purchase price for the property. See *Kansas City Power and Light v. Strong*, 302 Kan. 712, 726, 356 P.3d 1064 (2015).

Instructing the jury that its finding "must fall within the range of testimony as to the fair market value" implements *Mettee v. Kemp*, 236 Kan. 781, 696 P.2d 947 (1985), and works well when all opinion evidence of value is based upon comparable sales and uses the unit rule. Because of the 1999 amendment

to K.S.A. 26-513(e), however, there may be cases in which use of this language may be inappropriate. The amendment permits fair market value to be determined “by the use of comparable sales, cost or capitalization of income appraisal methods or any combination of such methods.” *Creason v. Unified Gov’t of Wyandotte County*, 272 Kan. 482, 33 P.3d 850 (2001), held admissible expert testimony using the capitalization of income method to determine the value of a gas well even though the expert was not qualified to testify about land values generally and could not give an opinion about the unit fair market value of the property. When the testimony of such an expert is admitted, it may provide a basis for a jury award outside the range of testimony given by appraisers who relied upon some other method of valuation, such as comparable sales alone, to derive a value.

Comment

Improvements upon the land, although not to be valued separately, are to be considered in ascertaining market value. *Hoy v. Kansas Turnpike Authority*, 184 Kan. 70, 334 P.2d 315 (1959). Minerals are not to be valued separately under the unit rule. *Reiter v. State Highway Commission*, 177 Kan. 683, 281 P.2d 1080 (1955).

The unit rule in *Hoy* is applicable whenever the market data approach of appraisal is employed. The depreciated replacement cost method or the capitalization of income method do not require the application of the unit rule. *Ellis v. City of Kansas City*, 225 Kan. 168, 589 P.2d 552 (1979).

The 1999 amendment to K.S.A. 26-513(e) provides that fair market value “shall be determined by use of the comparable sales, cost or capitalization of income appraisal methods or any combination of such methods.” The comparable sales method no longer is the preferred method of valuing property. *Creason v. Unified Gov’t of Wyandotte County*, 272 Kan. 482, 33 P.3d 850 (2001); *City of Wichita v. Eisenring*, 269 Kan. 767, 7 P.3d 1248 (2000).

Although expert testimony may be admitted which relates solely to the future income potential of the property, an aspect of the “unit rule” nevertheless remains effective to provide that an award of compensation must reflect the value of the property as a whole. *Creason v. Unified Gov’t of Wyandotte County*, 272 Kan. 482, Syl. ¶ 5, 33 P.3d 850 (2001). There is an important distinction between the measure of value and the evidence admissible to prove it. The award of just compensation cannot assign separate values to component parts of the property, such as by giving one value to the land, another value to the water rights, and another to the mineral rights. However, to demonstrate how the value of the property as a whole is enhanced by a natural asset, evidence can be introduced of its separate value. *Id.*, Syl. ¶ 4.

A landowner is not entitled to have the value of the land enhanced merely by the result of the public improvement. The property owner should neither be penalized for nor benefited by any deflationary or inflationary effect of the nature of the improvement itself. *Board of Sedgwick County Comm’rs v. Kiser Living Trust*, 250 Kan. 84, Syl. ¶ 2, 825 P.2d 130 (1992).

Damages based on fears of danger inherent in transmission lines held to be too speculative, conjectural, or remote. *Yagel v. Kansas Gas & Electric Co.*, 131 Kan. 267, 291 P. 768 (1930). But compare *Willsey v. Kansas City Power and Light Co.*, 6 Kan. App. 2d 599, 631 P.2d 268, *rev. denied* 230 Kan. 819 (1981), where it was held an opinion of value of a qualified witness based on the existence of fear in buying public in general which affects market value is admissible.

Possible future damages to land, fences, and crops are not allowable. However, damages caused during construction should be allowed. *United Power & Light Corp. v. Murphy*, 135 Kan. 100, 9 P.2d 658 (1932).

The jury’s findings as to the “before” and “after” value of the property taken must fall within the range of the opinion testimony. The opinion testimony may also include the testimony of the landowner as to value. *Mettee v. Kemp*, 236 Kan. 781, 696 P.2d 947 (1985). Additur or remittitur is not an appropriate remedy in an eminent domain proceeding where the jury’s finding of “after” value is outside the range of

the opinion testimony; the trial court must grant a motion for new trial. *In re Condemnation of Land for State Highway Purposes*, 269 Kan. 128, 3 P.3d 1268 (2000).

The measure of damages for a partial taking in an inverse condemnation proceeding is the difference between the value of the entire property immediately before the taking and the value of that portion of the property remaining immediately after the taking. *Garrett v. City of Topeka*, 259 Kan. 896, 916 P.2d 21 (1996).

There is a legal distinction between “right of access” and “regulation of traffic flow.” Loss of the former supports compensation; the latter is a police power and so long as reasonable, precludes compensation. *Eberth v. Carlson*, 266 Kan. 726, 971 P.2d 1182 (1999); *City of Wichita v. McDonald’s Corp.*, 266 Kan. 708, 971 P.2d 1189 (1999). In *Eberth*, the Supreme Court noted its economic taking discussion in *Garrett v. City of Topeka*, 259 Kan. 896, 916 P.2d 21 (1996), is limited to its specific facts. 266 Kan. at 735-36. In *Miller v. Preisser*, 295 Kan. 356, 284 P.3d 290 (2012), the court discusses the distinction between “right of access” and “regulation of traffic flow.” The court, however, makes it clear that an unreasonable exercise of police power in exercising the right to regulate traffic flow is not an element of compensation in eminent domain matters.

In *City of Wichita v. McDonald’s*, *supra*, confronted with the landowner’s complaints of dust, rodents and construction noise, it was held absent a showing of damages special to the property affected, and not damages suffered by the general public, there can be no recovery. 266 Kan. at 720.

City of Wichita v. McDonald’s also held “the term ‘view’ in K.S.A. 26-513(d)(5) does not mean view from the highway or the ‘right to be seen’; it means view from the property.” 266 Kan. 708, Syl. ¶ 6.

Dividing this instruction into three separate instructions is not clearly erroneous. *Secretary of Kansas Dept. of Transportation v. Underwood Equipment, Inc.*, 273 Kan. 453, 44 P.3d 439 (2002) (jury “was properly instructed” where final two paragraphs were placed in separate instructions).

For additional commentary, see Comment under PIK 4th 131.03, Measure of Compensation—Taking of Entire Tract.

The court has an obligation to initially determine the relevancy of a prior sale being urged as a comparable sale. The court should consider such factors as: whether the prior sale was a bona fide and voluntary arm’s length transaction; whether the prior sale was too remote in time; and whether the conditions of the previously sold property and surrounding area are sufficiently similar to the condemned land. *Mooney v. City of Overland Park*, 283 Kan. 617, 153 P.3d 1252 (2007).

Considerable discretion is vested in the trial court in an eminent domain proceeding in admitting or rejecting evidence of value, and the latitude accorded to the parties in bringing out collateral and cumulative facts to support value estimates is left largely to the discretion of the trial court. *Butler County Rural Water Dist. No. 8 v. Yates*, 275 Kan. 291, 64 P.3d 357 (2003).

The only issue on an appeal from a condemnation award is the fair market value of the property taken, and the court’s authority does not extend beyond that which is conferred by statute. As such, the court has no jurisdiction to address constitutional issues or attorney fees claimed. *Miller v. Bartle*, 283 Kan. 108, 150 P.3d 1282 (2007).

A property owner’s opinion as to the fair market value of the owner’s land is relevant to the determination of the issue of fair market value. However, a property owner may not testify using an appraisal method for which the property owner has not been established as an expert. *Manhattan Ice and Cold Storage, Inc. v. City of Manhattan*, 294 Kan. 60, 274 P.3d 609 (2012); and *In re Acquisition of Property by Eminent Domain*, 299 Kan. 37, 320 P.3d 955 (2014).

131.05

FAIR MARKET VALUE—DEFINITION

To arrive at an award in this proceeding, you need to know the meaning of “fair market value.”

Fair market value is the amount in terms of money that a well-informed buyer is justified in paying and a well-informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion.

Fair market value shall be determined by use of (1) the comparable sales method, which values the property based upon the recent sales of comparable property; (2) the depreciated replacement cost method, which values the property based upon the reproduction cost of the property less depreciation; (3) the capitalization of income method, which values the property based upon the capitalization of net income from the property; or (4) any combination of these methods.

In determining fair market value, you should consider all of the possible uses to which the property could have been put, including the best and most advantageous use to which the property was reasonably adaptable, but your considerations must not be speculative, conjectural, or remote. The uses which may be considered must have been so reasonably probable as to have had an effect on the fair market value of the property at the time of the taking.

Notes on Use

K.S.A. 26-513 calls for “just compensation” and provides that the measure of compensation is the “fair market value” of the property. See K.S.A. 26-513(e) for the definition of “fair market value.”

The paragraph specifying the appraisal methods that are to be used to determine value should be given when evidence of value based upon more than one method is admitted but any method that was not the basis of evidence admitted at trial should be omitted.

Comment

The 1999 amendment to K.S.A. 26-513(e) specified the appraisal methods to be used in valuing real estate and placed the three generally recognized methods on equal footing. The comparable sales method no longer is the preferred method of valuation. *Creason v. Unified Gov’t of Wyandotte County*, 272 Kan. 482, 33 P.3d 850 (2001); *City of Wichita v. Eisenring*, 269 Kan. 767, 7 P.3d 1248 (2000). The amendment permits the use of the depreciated replacement cost and the capitalization of income methods when they provide information pertaining to the value of the property. *Creason*, 272 Kan. at 489-490.

Although expert testimony may be admitted which relates solely to the future income potential of the property, an aspect of the “unit rule” nevertheless remains effective to provide that an award of compensation must reflect the value of the property as a whole. *Creason v. Unified Gov’t of Wyandotte County*, 272 Kan. 482, Syl. ¶ 5, 33 P.3d 850 (2001). There is an important distinction between the measure

of value and the evidence admissible to prove it. The award of just compensation cannot assign separate values to component parts of the property, such as by giving one value to the land, another value to the water rights, and another to the mineral rights. However, to demonstrate how the value of the property as a whole is enhanced by a natural asset, evidence can be introduced of its separate value. *Id.*, Syl. ¶ 4.

The Supreme Court in *Board of Johnson County Comm'rs v. Smith*, 280 Kan. 588, 123 P.3d 1271 (2005), approved PIK 3d 131.05 [now PIK 4th 131.05] as a correct statement of the adaptability factor found as one of 14 nonexclusive factors of compensation in K.S.A. 26-513(d)(1).

In *Manhattan Ice and Cold Storage, Inc. v. City of Manhattan*, 294 Kan. 60, 274 P.3d 609 (2012), the Supreme Court approved of the PIK Committee's comment in PIK 4th 131.05 and the notes on use in PIK 4th 131.08 and 131.09, and specifically stated that 131.08 and 131.09 were outdated methods of determining value. The court stated that all generally recognized methods of determining fair market value, as set forth in K.S.A. 26-513, are covered by PIK 4th 131.05.

In *Miller v. Preisser*, 295 Kan. 356, 284 P.3d 290 (2012), the Supreme Court found that the doctrine of assemblage may be used as a factor in determining appropriate damages. This doctrine applies when the highest and best use of separate parcels involves their integrated use with other lands. The integrated use must be present or reasonably probable in the near future. If the integrated use is present or reasonably probable, the property owner may introduce evidence that the fair market value of the owner's real estate is enhanced by its assemblage with another parcel or parcels. The court stated, however, that when this doctrine applies, the trial court should specifically instruct the jury that compensation must be limited to the loss in fair market value of the land in issue and that any diminution in the value of the other land in assemblage may not be considered.

131.06

PROBABILITY OF REZONING

If you find that the best use to which the land could have been put at the time of the taking was a use other than that for which it was zoned at the time, and that there was a reasonable probability of its being later rezoned to permit such use, then you may consider such use in determining the market values.

Notes on Use

This instruction, when applicable, should be given following PIK 4th 131.05, Market Value—Definition. The situation requiring this instruction will usually arise where the property is in an area that is susceptible of being zoned for a use other than that for which it is being used at the time of condemnation.

Comment

In *Regnier Builders, Inc. v. Linwood School District No. 1*, 189 Kan. 360, 369 P.2d 316 (1962), the court approved an instruction similar to the above instruction.

Determining the uses to which the property was reasonably adaptable includes consideration of a reasonable probability of zoning changes. *Board of Johnson County Comm'rs v. Smith*, 280 Kan. 588, 123 P.3d 1271 (2005).

The Supreme Court approved the wording in this instruction in *Kansas City Mall Assocs. v. Unified Gov't of Wyandotte County/KCK*, 294 Kan. 1, 272 P.3d 600 (2012) as a correct statement of the law regarding the possibility of rezoning and the property's highest and best use. The court further cautioned that zoning was not dispositive of the issue of fair market value.

131.07

LIMITED ROAD ACCESS

The taking of the right of access to and from an existing (*public street*) (*highway*) is a factor that you should consider in determining the market value of the remainder.

Notes on Use

Authority for this instruction and discussion of subject matter may be found in *Smith v. State Highway Commission*, 185 Kan. 445, 346 P.2d 259 (1959). PIK 2d 11.13 included a definition of limited access facility patterned after K.S.A. 68-1901. The Committee does not believe that definition would normally mean anything to a jury or help them in determining market value.

Comment

Where a new controlled access highway is established by condemnation through property where no highway previously existed, there is no taking of a right of access because no such right of access in fact existed. *Moore v. State Highway Commission*, 191 Kan. 624, 383 P.2d 549 (1963). But compare *Garrett v. City of Topeka*, 259 Kan. 896, 916 P.2d 21 (1996), where it was held a landowner was entitled to compensation for the impairment of access where the rerouting or circuitry of travel was unreasonable.

Whether the State Highway Commission has exceeded the police power in restricting access rights to a highway is a matter for the determination of the trial court as a matter of law and this determination should be made before the case is submitted to the jury to ascertain damages. *Brock v. State Highway Commission*, 195 Kan. 361, 404 P.2d 934 (1965).

An owner of land adjoining a road or highway enjoys a right of access which entitles the owner to go and return from his own land to the road or highway without unreasonable interference. The right of an abutting owner cannot be taken or materially interfered with without just compensation. *Pringle v. City of Wichita*, 22 Kan. App. 2d 297, Syl. ¶ 2, 917 P.2d 1351 (1996).

There is a legal distinction between “right of access” and “regulation of traffic flow.” Loss of the former supports compensation; the latter is a police power and so long as reasonable, precludes compensation. *Eberth v. Carlson*, 266 Kan. 726, 971 P.2d 1182 (1999); *City of Wichita v. McDonald’s Corp.*, 266 Kan. 708, 971 P.2d 1189 (1999). See also *Korytkowski v. City of Ottawa*, 283 Kan. 122, 152 P.3d 53 (2007); and *Kau Kau Take Home No. 1 v. City of Wichita*, 281 Kan. 1185, 135 P.3d 1221 (2006). In *Eberth*, the Supreme Court noted its economic taking discussion in *Garrett v. City of Topeka*, 259 Kan. 896, 916 P.2d 21 (1996), is limited to its specific facts. 266 Kan. at 735-36. In *Miller v. Preisser*, 295 Kan. 356, 284 P.3d 290 (2012), the court discusses the distinction between “right of access” and “regulation of traffic flow.” The court, however, makes it clear that an unreasonable exercise of police power in exercising the right to regulate traffic flow is not an element of compensation in eminent domain matters.

131.08

**MEASURE OF COMPENSATION—NO MEASURABLE
MARKET VALUE—ISSUE OF FACT**

Comment

This instruction has been deleted. The Supreme Court in *Manhattan Ice and Cold Storage, Inc. v. City of Manhattan*, 294 Kan. 60, 274 P.3d 609 (2012), stated that this instruction is outdated and that PIK 4th 131.05 should be used instead.

131.09**MEASURE OF COMPENSATION—PARTIES AGREE OR HELD
AS A MATTER OF LAW PROPERTY HAS NO MEASURABLE
MARKET VALUE—TAKING OF ENTIRE TRACT****Comment**

This instruction has been deleted. The Supreme Court in *Manhattan Ice and Cold Storage, Inc. v. City of Manhattan*, 294 Kan. 60, 274 P.3d 609 (2012), stated that this instruction is outdated and that PIK 4th 131.05 should be used instead.

131.10

**MEASURE OF COMPENSATION—WHEN AGREED OR AS
A MATTER OF LAW HELD THAT THE PROPERTY HAS NO
MEASURABLE MARKET VALUE—PARTIAL TAKING**

Comment

This instruction has been deleted. The Supreme Court in *Manhattan Ice and Cold Storage, Inc. v. City of Manhattan*, 294 Kan. 60, 274 P.3d 609 (2012), stated that PIK 4th 131.08 and 131.09 are outdated and that PIK 4th 131.05 should be used instead. Although the decision did not involve a partial taking, the same reasoning would apply to this instruction.

131.11**EASEMENT—DEFINITION—MEASURE OF COMPENSATION**

The *(insert name of condemnor)* has taken an easement for the purpose of _____. This easement will be *(temporary)* *(permanent)*.

An easement is the right to use the land of another for a limited purpose, all other rights and title remaining in the owner.

The owner has the right to continue to use the property only for such purposes as do not interfere with the easement.

The measure of compensation for an easement is the difference between the market value of the entire tract immediately before the taking and the market value of the tract burdened with the easement immediately after the taking.

Notes on Use

The Committee believes unless there is evidence in the case that the fee burdened with the easement retains some value to the property owner, this instruction should be unnecessary. The parties will usually be able to agree that the jury should be instructed as though the fee were taken.

Comment

In *City of Ottawa v. Heathman*, 236 Kan. 417, 690 P.2d 1375 (1984), the jury's deliberate failure to determine damages in accord with PIK 2d 11.08 [PIK 4th 131.11] justified an order granting a new trial.

131.12

SALE PRICES OF OTHER LAND

The Committee recommends that there be no separate instruction on comparable sales.

Comment

The initial question of the admissibility of comparable sales is one for the court. If the evidence is admitted, it should be considered as any other evidence.

131.13**SETOFF OF SPECIAL BENEFITS**

The Committee recommends that there be no separate instruction on setoff of special benefits.

Comment

The evidence regarding special benefits should be considered as any other evidence.

131.14

EXPERT WITNESSES

The Committee recommends that there be no separate instruction on the testimony of expert witnesses.

Comment

The testimony of an expert should be considered the same as any other witness. See PIK 4th 102.20, Evaluation of Testimony.

An expert witness's opinion of value may be based upon reliable hearsay such as market data and trade journals. *City of Wichita v. Eisenring*, 269 Kan. 767, 7 P.3d 1248 (2000).

131.15**VIEW OF PREMISES**

You have viewed the premises. You may consider what you have seen along with the other evidence in the case in arriving at an award.

Notes on Use

For an instruction to be given prior to visiting the scene or area, see PIK 4th 101.40. See also K.S.A. 60-248(b). The trial judge may wish to consider adding the text of this instruction to PIK 4th 102.02, Evaluation of Evidence, Including Depositions.

Comment

In *Taylor v. State Highway Commission*, 182 Kan. 397, 320 P.2d 832 (1958), the court stated, “[i]n addition to the evidence adduced in the trial, the jury was sent to the premises and that viewing could be considered along with all other evidence in arriving at a verdict determining the amount of the landowner’s damage.”

View of the premises is within the court’s discretion. *Dibble v. State Highway Commission*, 204 Kan. 111, 460 P.2d 584 (1969).

131.16

CHART SUMMARIZING VALUATIONS BY WITNESSES

	Valuation of entire property or interest immediately before the taking	Valuation of that portion of the tract or interest remaining immediately after the taking	Difference = Total Compensation Due
<i>(Property Owner)</i>			
<i>(Witness)</i>			
<i>(Witness)</i>			
<i>(Witness)</i>			
<i>(Witness)</i>			
<i>(Witness)</i>			

Comment

This is not an instruction to the jury, but is a form for convenient summary of testimony that is often difficult to remember. The summary may go to the jury by mutual consent of counsel.

See PIK 4th 101.11, Note Taking by Jurors.

The use of this chart was referred to and set out in the court's opinion as an aid to the jury in *Kansas State Highway Commission v. Roepke*, 200 Kan. 660, 438 P.2d 122 (1968).

131.17

v.

Case Number _____

JUDGE'S INSTRUCTIONS TO APPRAISERS

_____, _____ and _____, each of you have been appointed as appraisers and before entering upon the performance of your duties, you must execute an oath to faithfully discharge your duties. You will serve as officers of this court. You are not acting as representatives of any party. The following instructions are given to you by the court. It is your duty to follow these instructions and determine just compensation in this proceeding based solely upon the instructions and the information provided you consistent with these instructions.

After executing your oath, you should undertake your duties and file a report with the court through the clerk of the district court within 45 days from today, unless the court upon your request before the 45 days expires would allow additional time.

Except for incidental contact for the purpose of verifying factual information relating to the subject real estate or to discuss scheduling matters, in the discharge of your duties, you should avoid any meetings or discussions with representatives of the condemnor or the property owner without first advising the adverse party and affording both parties an opportunity to be present. If you receive any written material from a party, you must immediately provide that material to the adverse party.

View of Land

You are to undertake an actual view of the land to be taken and of the remainder if a partial taking.

Hearings

You are to conduct a public hearing in the county where the condemnation proceeding is pending. At the hearing you shall take the oral or written testimony of the condemnor, landowner, lienholders of record, and any party(ies) in possession.

Notice of the hearing shall be mailed at least 14 days in advance of the hearing to the condemnor and to each party named in the condemnation petition filed with the court if his or her address is known or can with reasonable diligence be located. Also, notice shall also be given by one publication in a newspaper of general circulation in each county where the subject lands are located at least 14 days before the hearing. If you do not meet on the day designated in the notice, you may meet on the following day without further notice, but otherwise a new notice shall be required with the same time considerations as required in the original notices.

Your written notice to parties and for publication should be substantially in compliance with the form set forth by the Judicial Council.

Fair Market Value

The term “fair market value” as used in these instructions means the amount in terms of money that a well-informed buyer is justified in paying and a well-informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion. The fair market value shall be determined by use of the comparable sales, cost or capitalization of income appraisal methods or any combination of such methods.

In determining fair market value you are to consider all of the possibilities for the use of the land and interest taken, including the best and most advantageous use to which the property is reasonably adaptable, but this best and most advantageous use must not be speculative, conjectural, or remote. The uses which may be considered must be so reasonably probable as to have an effect on the fair market value of the land at the time of the taking. Unless the court instructs you to the contrary, the time of taking means at the time you file your award.

In determining fair market value, you are to consider the nature of the interest condemned as described in the condemnor’s petition. Fair market value must be determined based upon the rights acquired under that described taking and not by any representations as to a limited use of those rights.

Determining Just Compensation

K.S.A. 26-513 provides that private property shall not be taken or damaged for public use without just compensation. A copy of K.S.A. 26-513 is attached to these instructions. Your job and duty as an appraiser is to determine what is just compensation.

If an entire tract of land or interest in the entire tract is taken, the measure of compensation you are to apply is the fair market value of the property or interest at the time of the taking.

If only a part of a tract of land or interest is taken, the compensation and measure of damages are the difference between the fair market value of the entire property or interest immediately before the taking, and the value of that portion or portions of the tract or interest remaining immediately after the taking.

K.S.A. 26-513(d) sets out the factors you must consider in determining just compensation for the taking. In addition to the statutory factors, you may consider any other evidence or factor which a buyer or seller would consider in determining the value of the property. Remember that the factors found by you to affect the value of the property are not to be considered as separate items of damage, but are to be considered only as they affect the total compensation to be awarded. In other words, your duty is to appraise each tract or parcel and the interests therein as a whole.

Additional Instructions

If you have any questions regarding your duties or these instructions or need additional information, do not hesitate to ask the court for assistance. Your questions or inquiries should be placed in written form to provide documentation.

Compensation and Expenses

You should maintain a record of your time, costs and expenses. You should file your itemizations together with your appraisers' report with the clerk of the _____ County District Court. The court has the responsibility to then determine the amount of fees and costs to be allowed.

The above instructions were given by the undersigned district judge to the appraisers appointed in this proceeding on this _____ day of _____, _____.

Judge

Acknowledgment by Appraisers

We, the undersigned appraisers in the above-styled proceeding do hereby acknowledge receiving the above instructions of law from the court on this ____ day of _____, _____.

Appraiser

Appraiser

Appraiser

Notes on Use

For authority, see K.S.A. 26-505.

Comment

In most cases, the interest set out in the condemnation petition determines the interest to be taken. *In re Application of City of Great Bend for Appointment of Appraisers*, 254 Kan. 699 Syl. ¶ 2, 869 P.2d 587 (1993). Further, the rights acquired, not the intended use of those rights, are the basis for assessing landowners' damages. *Id.*, at Syl. ¶ 4.

A. RULES OF LIABILITY

132.01

FELA—GENERAL STATUTORY RULE OF LIABILITY

The federal law under which the plaintiff claims the right to recover damages in this action provides that a common carrier by railroad, while engaged in interstate commerce, shall be liable in damages whenever its employee is *(injured)* *(killed)* while engaged in the course of *(his)* *(her)* employment and *(injury)* *(death)* results in whole or in part [from the negligence of any of the officers, agents, or employees of the railroad] [by reason of any defect or insufficiency due to the railroad’s negligence, in its (... machinery, roadbed, equipment, etc.)].

[It is established that, at all times material to this action, the defendant was a common carrier by railroad engaged in interstate commerce; that the plaintiff was an employee of the defendant engaged in such commerce; and that this action is governed by the provisions of the Federal law.]

Notes on Use

The first paragraph of the instruction must be modified by the proper material in parentheses and brackets to fit the charges of negligence to be submitted to the jury. If the case involves only allegations charging negligence of an employee, the phrase concerning equipment should be omitted. The last phrase concerning equipment should be completed by the appropriate words of the statute. These words are “cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.”

Because the statute and instruction use the phrase “while engaged in the course of his employment,” PIK 4th 132.10, Course of Employment as a Matter of Law, or PIK 4th 132.11, Course of Employment as a Question of Fact, should be used with this instruction.

In the usual case there are no factual issues as to whether the defendant was a common carrier by railroad in interstate commerce and as to whether the plaintiff was employed in such commerce. In such cases, the bracketed optional paragraph of the instruction may be used to clarify these points. If such issues exist, the instruction should be modified by the definitional language of 53 Stat. 1404 (1939), 45 U.S.C. 51 (1964).

This instruction should be accompanied by PIK 4th 103.01, which defines negligence. No additional instruction on causation, such as PIK 4th 104.01, is needed, for the statutory language “results in whole or in part,” is sufficient under the FELA. For further discussion and authorities on causation see the second paragraph of the comment to this instruction.

If jurors have had experience in the trial of negligence actions under state law, it may be advisable to instruct them to disregard any conceptions they may have with respect to the law of negligence gained from instructions in those cases. See PIK 4th 102.01-102.09 for general cautionary instructions.

Comment

The Federal Employers' Liability Act (FELA), 53 Stat. 1404 (1939), 45 U.S.C. 51, 54 (1964), 35 Stat. 65 (1908), 45 U.S.C. 52 (1964); 35 Stat. 66 (1908), 45 U.S.C. 53, 55, 57, 58 (1964); 62 Stat. 989 (1948), 45 U.S.C. 56 (1964); 36 Stat. 291 (1910), 45 U.S.C. 59 (1964), governs an action for damages for injury or death of a railroad employee engaged in interstate commerce. The basis of recovery can be either common-law negligence (PIK 4th 132.01-132.03), as codified by the FELA, or a violation of the Safety Appliance Act, 49 U.S.C. 20301-20306 (2000), (PIK 4th 132.07), or both. Authority for instructions on both theories may be found in *Gowins v. Pennsylvania R. Co.*, 299 F.2d 431 (6th Cir. 1962), *cert. denied* 371 U.S. 824, 83 S. Ct. 44, 9 L. Ed. 2d 64 (1962). The decisions of the Supreme Court of the United States are controlling as to the interpretation and effect of both the FELA and the Safety Appliance Act. *Underwood v. Missouri-Kansas-Texas Rld. Co.*, 191 Kan. 338, 381 P.2d 510 (1963).

The special features of the FELA make the statutory action significantly different from the ordinary common-law negligence action. It is clear that the FELA is to be uniformly construed and applied by both state and federal tribunals following the judicial precedents established by the U. S. Supreme Court. What constitutes negligence and causation under the FELA is a federal question and does not vary with the differing principles of negligence applicable under state and local laws for other purposes. Federal decisional law governs. See *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). Thus, because of the "in whole or in part" language of the FELA, the traditional doctrine of proximate cause is not applicable. *Eglsaer v. Scandrett*, 151 F.2d 562 (7th Cir. 1945). A railroad is liable if its negligence played any part, even the slightest, in producing the employee's injury. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), *reh. denied* 353 U.S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764 (1957). An instruction is sometimes requested that the plaintiff cannot recover if his negligence was "the sole and proximate cause" of the injury or death. Such an instruction is incorrect because of the use of the word "proximate," as pointed out above. The so-called "sole cause" instruction adds nothing except the possibility of confusion of the issues. The plaintiff is entitled to recover if his injury was caused "in whole or in part" by negligence of the defendant (or by a violation of the Safety Appliance Act). If the only cause of his injury was his own negligence, then he is not entitled to recover. "Sole cause" or "sole proximate cause" instructions are similar to the "accident" instruction; see Comment, PIK 4th 121.87, Unavoidable Accident. *Page v. St. Louis S. W. Ry. Co.*, 349 F.2d 820 (5th Cir. 1965). In *Ross v. St. Louis & S. F. R. Co.*, 93 Kan. 517, 144 P. 844 (1914), an order granting a new trial was affirmed because the instruction, "if you find ... negligence of the deceased ... was the sole and proximate cause of his death ... you should find for defendant," was held to misstate the law and to contain language that was unclear and confusing. An excellent discussion of causation under the FELA may be found in *Eglsaer v. Scandrett*, 151 F.2d 562 (7th Cir. 1945) and *Page v. St. Louis S. W. Ry. Co.*, 349 F.2d 820 (5th Cir. 1965).

In a Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* (1988) action, the plaintiff has a lower standard of proof of causation than under a common-law tort theory. The relaxed standard of proof of causation under the Federal Employers' Liability Act does not obviate the need for expert opinion testimony in certain cases. When the conclusion of causation is not within the common knowledge of a jury, expert testimony is required. *Knowles v. Burlington Northern R.R. Co.*, 18 Kan. App. 2d 608, 856 P.2d 1352 (1993).

To maintain a claim under FELA, an employee is required to prove that the railroad was his employer, at the time of his injury. Federal Employers' Liability Act, §§ 1 *et seq.*, 45 U.S.C. §§ 51 *et seq.* *Doughty v. CSX Transportation, Inc.*, 258 Kan. 493, 905 P.2d 106 (1995).

The common-law defense of contributory negligence is unavailable as a complete defense to the statutory action and operates only to diminish the plaintiff's recovery. See PIK 4th 132.21, Contributory Negligence Not an Issue, and Comment. Further, assumption of risk has been abolished as a bar to recovery, 53 Stat. 1404 (1939), 45 U.S.C. 54 (1964). Important changes were written into the FELA in the 1939 amendment, 53 Stat. 1404 (1939), 45 U.S.C. 51 (1964), with respect to those employees engaged in interstate commerce and in abolishing the defense of assumption of risk. Cases decided prior to this

amendment should not be considered as authority on these subjects. When an action is based on a violation of the Safety Appliance Act or Boiler Inspection Act, it is not necessary to show negligence, for a violation supplies the act necessary for a finding of railroad liability. See PIK 4th 132.04-132.07 and Comment. A general discussion of the Federal Employers' Liability Act may be found in an article by Richter and Forer, Federal Employers' Liability Act, 12 FRD 13 (1951).

In an action filed under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* (1988), physical impact under the "zone of danger test" contemplates an impact relating to the resulting emotional distress. Where evidence establishes that plaintiff experienced no fear for his or her personal safety and that the physical impact did not cause injury and did not have any effect on plaintiff's resulting severe emotional distress, plaintiff's claim for negligent infliction of emotional distress fails. *Grube v. Union Pacific R.R. Co.*, 256 Kan. 519, 886 P.2d 845 (1994).

The joinder of a FELA action with a common-law action has been sustained. *Bankson v. Illinois Cent. R. Co.*, 196 Fed. 171 (N.D. Iowa, 1912). In such cases the principles applicable to contributory negligence for both actions are less confusing if stated in one instruction. No cases of this nature have been found in Kansas and it is believed the situation will arise so rarely that an instruction is not needed in this work.

For additional examples of jury instructions used under the Federal Employer's Liability Act, see 3 Illinois Forms of Jury Instruction, Ch. 91 (1996), and O'Malley, Grenig and Lee, Federal Jury Practice and Instructions 5th ed.—Civil, Vol. 3A, Ch. 155 (2001).

132.02

FELA—COMMON-LAW DUTY TO PROVIDE SAFE TOOLS AND MACHINERY

It is the duty of a railroad to use reasonable care to provide its employees with reasonably safe and suitable (*tools*) (*machinery*) (*appliances*) with which to work.

What constitutes safe and suitable (*tools*) (*machinery*) (*appliances*) depends on the risk involved in the work and all of the circumstances then existing.

Comment

The railroad has a duty to exercise reasonable care to furnish its employees with reasonably safe tools and appliances. This duty does not require it to furnish the newest or even the safest and most approved devices if the employee is not deceived as to the degree of danger to which he is subjected. *McGivern v. Northern Pac. Ry. Co.*, 132 F.2d 213 (8th Cir. 1942).

A railroad engaged in interstate commerce has a duty under the FELA to furnish its employees with a reasonably safe place to work and safe equipment to work with, and a failure to do so constitutes negligence. *Missouri-Kansas-Texas R. Co. v. Brown*, 348 P.2d 1069 (Okla 1959).

Two leading U. S. Supreme Court cases on this subject are *Honeycutt v. Wabash Railroad Company*, 303 S.W.2d 153 (Mo. App. 1957), *revd* 355 U.S. 424, 78 S. Ct. 393, 2 L. Ed. 2d 380, and *Gulf, C. & S. F. Ry. Co. v. Deen*, 275 S.W.2d 529 (Tex.Civ.App. 1955), *error ref'n r e, revd* 353 U.S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 721 (mandamus petition granted on question of conforming state court decision to that of U. S. Supreme Court, *Deen v. Hickman*, 358 U.S. 57, 79 S. Ct. 1, 3 L. Ed. 2d 28 (1958)). In the *Honeycutt* case the employee was operating a rivet gun under a car when the trigger caught on an unknown object and discharged a metal clip, causing injury. The Supreme Court held that proofs justified with reason the jury's conclusion that the employer's negligence had played a part in producing the employee's injury. In the *Deen* case the employee's injuries were inflicted by falling babbitt and it was held that proofs justified the conclusion that the employer's negligence played a part in producing the employee's injury.

It is the nondelegable obligation of the employer under the FELA to provide a sufficient number of workers for a particular task. In *Southern Ry. Co. v. Welch*, 247 F.2d 340 (6th Cir.1957), the employer's negligence in not providing assistance for the task in question was held to have played some part in the injury. A protest or request by the employee for additional help may, considered with other circumstances, constitute evidence of the employer's negligence.

If it is alleged that the negligence of the railroad was a failure to comply with the duty to furnish sufficient employees for the job, the above instruction should be modified accordingly.

It has been held that *res ipsa loquitur* applies in FELA cases. The *res ipsa loquitur* doctrine is simply a rule of evidence and like any other rule of evidence it is brought into play where the situation presented makes it applicable. See *Miller v. Cincinnati, New Orleans and Texas Pacific Ry. Co.*, 317 F.2d 693 (6th Cir. 1963), and the following annotations: *Res Ipsa Loquitur in Federal Employers' Liability Act Cases*, 35 A.L.R. 2d 475; *Liability Under Federal Employers' Liability Act, for Injury to or Death of Employee Riding Train Resulting From Sudden Stop, Start, or Jerk of Train*, 60 A.L.R. 2d 637; *Res Ipsa Loquitur as Ground for Direction of Verdict in Favor of Plaintiff*, 97 A.L.R. 2d 522.

132.03

**FELA—COMMON-LAW DUTY TO PROVIDE A
REASONABLY SAFE PLACE TO WORK**

It is the duty of a railroad to use reasonable care to provide its employees with a safe place to work. The degree of care depends upon the danger involved in the work and all the circumstances then existing.

Comment

A railroad engaged in interstate commerce has the duty to use reasonable care to furnish its employees with a safe place in which to work. *Rubley v. Louisville & Nashville R. Co.*, 208 F. Supp. 798 (DC Tenn. 1962).

The duty to use reasonable care in providing a safe place to work is nondelegable, actual notice is not indispensable, and constructive notice is sufficient. *Security Ins. Co. of New Haven v. Johnson*, 276 F.2d 182 (10th Cir. 1960). See PIK 4th 132.04, FELA—Notice of Defective Condition.

The common-law duty of the employer to use reasonable care in furnishing the employee with a safe place to work becomes more imperative as the risk increases. In all cases it is a question of reasonableness of care depending on the danger attending the place or the machinery. The duty to furnish a safe place to work is a continuing one from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent. *Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 (1943).

A FELA case illustrative of the duty to provide a safe place to work and sufficient materials, such as sand, gravel, salt, etc., to decrease the danger from ice and snow when it can reasonably be done, is *Chicago & North Western Railway Company v. Rieger*, 326 F.2d 329 (8th Cir. 1964), *cert. denied* 377 U.S. 917, 84 S. Ct. 1182, 12 L. Ed. 2d 186 (1964). Evidence of a railroad's direction to complete a job in 30 minutes, plus the inexperience of the brakeman assigned to the job, was sufficient to present a jury question of the negligence of the railroad in *Davis v. Virginian R. Co.*, 361 U.S. 354, 80 S. Ct. 387, 4 L. Ed. 2d 366 (1960), which case illustrates that a railroad's duty to provide a safe place for work includes a duty to furnish safe methods of work.

132.04

FELA—NOTICE OF DEFECTIVE CONDITION

Before you may find a railroad liable for the *(injury) (death)* of an employee resulting from a defective condition in *(equipment) ([his] [her] place of work)*, you must be satisfied that the railroad had either actual or constructive notice of the defective condition and that it had a reasonable opportunity to remove or repair the defect before the occurrence involved in this action.

Actual notice of a condition is said to exist when one has direct information of the condition. Constructive notice of a condition is said to exist when the condition is plainly visible or has existed long enough that by the use of reasonable care it should have been discovered. The legal effect of constructive notice is the same as actual notice.

To find that a railroad had notice, actual or constructive, of a defective condition, you must be satisfied that such notice was received *(by an employee who was authorized to repair or remedy such condition) (by an employee having a duty to report such condition to one in authority) (by a person who, in a reasonable delegation of responsibility, ought to have had such authority or duty)*.

Notes on Use

This instruction applies only to negligence actions under the FELA (PIK 4th 132.01-132.03) that are based on defective conditions in equipment or the place of work. It does not apply to actions based upon the Safety Appliance or Boiler Inspection Acts (PIK 4th 132.05- 132.08). The instruction must be modified for particular cases by the appropriate words or phrases in the parentheses.

Comment

The question of notice under the FELA has been held to be one for the jury. In one of the leading cases on this subject, the U. S. Court of Appeals for the Seventh Circuit reversed a judgment for a plaintiff in a FELA case on the ground that the evidence was insufficient to present a jury question of negligence. *Webb v. Illinois Cent. R. Co.*, 228 F.2d 257 (7th Cir. 1955). The U. S. Supreme Court reversed, holding that judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights, it seems, to make that appraisal, and, if the test is met, are bound to find that a case for a jury is made out whether or not the evidence allows the jury a choice of other probabilities. *Webb v. Illinois Cent. R. Co.*, 352 U.S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 (1957), *reh. denied* 353 U.S. 943, 77 S. Ct. 809, 1 L. Ed. 2d 764 (1957). This view is in accord with the view expressed by Chief Justice Horton in the early Kansas case of *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149 (1883).

In determining the question of whether or not silicosis caused by inhalation of dust from a faulty locomotive sanding apparatus was compensable under the FELA, the U. S. Supreme Court stated that it was for the jury to determine whether the defendant railroad had knowledge, actual or constructive, of the

alleged inadequacies of the equipment which caused the injury. *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949).

In an action brought by an employee under the FELA on a negligence theory charging the railroad with a failure to provide a safe place to work, the Federal District Court of Pennsylvania held that the common-law concept of the employer's duty to provide a safe place to work requires the employer to have actual or constructive notice of a defective condition. The court instructed the jury that it could not find the defendant negligent unless it also found that the defendant knew or should have known of the condition prior to the accident. *Fassbinder v. Pennsylvania R. Co.*, 193 F. Supp. 767 (DC Pa. 1961), *revd. on other grounds* 322 F.2d 859 (3rd Cir. 1963); *Kaminski v. Chicago River & Indiana R. Co.*, 200 F.2d 1 (7th Cir. 1952).

In an action against a railroad by an employee under the FELA for damages for occupational dermatitis allegedly resulting from exposure to diesel fuel oil, whether a railroad could or might have known of dangers to its employees from exposure to diesel oils and chromates contained therein were held to be questions of fact for a jury. *Crowley v. Elgin, Joliet & Eastern R. Co.*, 1 Ill. App. 2d 481, 117 N.E.2d 843 (1954), *cert. denied* 348 U.S. 927, 75 S. Ct. 340, 99 L. Ed. 727 (1955).

A railroad cannot be held negligent in the absence of proof that a defect had been known, or should have been known, and that there had been an opportunity to correct it. The establishment of such elements, however, may come from the proof of facts permitting a jury inference that the defect had been discovered, or should have been discovered by the exercise of reasonable care or inspection. *Miller v. Cincinnati, New Orleans and Texas Pacific Ry. Co.*, 317 F.2d 693 (6th Cir. 1963).

A railroad has a duty to inspect cars belonging to another railroad for defects before permitting its employees to work with them. The contention that there was no opportunity to obtain actual or constructive notice is not a defense. *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 83 S. Ct. 1667, 10 L. Ed. 2d 709 (1963).

132.05

SAFETY APPLIANCE ACT—AUTOMATIC COUPLER

The federal law under which the plaintiff claims the right to recover damages in this action imposes an absolute duty upon a railroad to have all of the cars it uses or allows to be used on its line equipped with couplers that will be automatically coupled by impact and that can be uncoupled without the necessity of workmen going between the ends of the cars.

This law is violated when a coupler fails to function properly (*when used or operated in the usual and customary manner*) (*because of a defect*).

Whenever a railroad employee is (*injured*) (*killed*) in the course of (*his*) (*her*) employment and the (*injury*) (*death*) results in whole or in part from a violation of the duty imposed by this law, the plaintiff is entitled to recover damages for such (*injury*) (*death*) even though the railroad was not negligent and even though the (*plaintiff*) (*decedent*) was negligent.

Notes on Use

The instruction is based on 49 U.S.C. 20302(a)(1)(A) (2000). The instruction should be made to conform to the evidence by use of one or both of the phrases in parentheses in the second paragraph. The phrase “in the course of employment” in the last paragraph may be omitted when no fact issue exists on this point. If a fact issue is presented as to whether interstate commerce was involved, or as to whether a car was being used on a railroad’s line, the instruction should be modified to cover such an issue.

Comment

The duty imposed by the Safety Appliance Act on a railroad operating in interstate commerce is absolute. The presence or absence of negligence of a railroad is immaterial in establishing a violation of the act. *Hallada v. Great Northern Railway*, 244 Minn. 81, 69 N.W.2d 673 (1955), *cert denied* 350 U.S. 874, 76 S. Ct. 119, 100 L. Ed. 773. In a Kansas case tried under the Safety Appliance Act, *Underwood v. Missouri-Kansas-Texas Rld. Co.*, 191 Kan. 338, 381 P.2d 510 (1963), the Kansas Supreme Court quoted from *Brady v. Terminal R. R. Assn.*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1938), as follows: “... The statutory liability (in relation to the use of a defective car) is not based upon the carrier’s negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous.” A railroad’s violation of the Safety Appliance Act, 49 U.S.C. 20301-20306 (2000), supplies the wrongful act necessary to find the railroad liable. *Carter v. Atlanta & St. A. B. R. Co.*, 338 U.S. 430, 70 S. Ct. 226, 94 L. Ed. 236 (1949).

In an action under the Safety Appliance Act, based upon the alleged improper operation of an automatic coupler, compliance with the statutory duty is tested by the performance of the appliance. “The failure of a coupler to work at any time sustains a charge that the Act has been violated.... That duty is absolute and unqualified and contemplates the maintenance of such appliances in working condition at all times.” *Philadelphia & R. Ry. Co. v. Auchenbach*, 16 F.2d 550 (3d Cir. 1926), *cert. denied* 273 U.S. 761, 47 S. Ct. 476, 71 L. Ed. 878 (1927).

Although in most cases under this section of the Safety Appliance Act the employee is injured as a result of going between cars, the place of his injury is not a necessary element to establish a violation of the act. For example see *Penn v. Chicago & N. W. Ry. Co.*, 163 F.2d 995 (7th Cir. 1947), *revd* 335 U.S. 849, 69 S. Ct. 79, 93 L. Ed. 398, *reh. denied* 335 U.S. 873, 69 S. Ct. 164, 93 L. Ed. 417 (1948), where the employee was running beside a car in attempting to use a pin lifter and stepped into a space between a switch rod and tie, injuring himself. The Act also requires couplers that will remain coupled until set free by some purposeful act of control. *O'Donnell v. Elgin J. & E. R. Co.*, 338 U.S. 384, 70 S. Ct. 200, 94 L. Ed. 187 (1949), *reh. denied* 338 U.S. 945, 70 S. Ct. 427, 94 L. Ed. 583 (1950). See Comment to PIK 4th 132.02, FELA—Common—Law Duty to Provide Safe Tools and Machinery, with regard to applicability of *res ipsa loquitur* in FELA cases.

The relationship between the FELA, Safety Appliance Act, and the Boiler Inspection Act is explained in *Carter v. Atlanta & St. A. B. R. Co.*, 338 U.S. 430, 70 S. Ct. 226, 94 L. Ed. 236 (1949).

When violations of the Safety Appliance and the Boiler Inspection Acts are involved, contributory negligence may not be considered in mitigation of damages. 35 Stat. 66 (1908), 45 U.S.C. 53 (1964). The defense of assumption of risk has also been abolished under the FELA, 53 Stat. 1404 (1939), 45 U.S.C. 54 (1964), and under the Safety Appliance Act, 49 U.S.C. 20304 (2000).

When evidence tends to support allegations of negligence and violation of the Safety Appliance Act, a plaintiff is entitled to have both instructions given, but a clear separation of the two kinds of actions should be observed to make a clear charge to the jury. As a practical matter an election to submit the case on one theory or the other is usually made at the conclusion of the evidence. *O'Donnell v. Elgin J. & E. R. Co.*, 338 U.S. 384, 70 S. Ct. 200, 94 L. Ed. 187 (1949). It is not mandatory, however, that the plaintiff make an election between the two theories of recovery at the close of the evidence. *Flanigan v. Hines*, 108 Kan. 133, 193 P. 1077 (1920).

Regulations made by the Interstate Commerce Commission pursuant to statutory authority were held to have the same force as those prescribed by statute. *Atchison, T. & S. F. R. Co. v. Scarlett*, 300 U.S. 471, 57 S. Ct. 541, 81 L. Ed. 748 (1937), *reh. denied* 301 U.S. 712, 57 S. Ct. 787, 81 L. Ed. 1365 (1937). The duties of the ICC under the Safety Appliance Act subsequently were transferred to the Secretary of Transportation. When pertinent regulations are in evidence, a jury may be instructed in substantially the following form: "The Secretary of Transportation, acting under authority of law, has made certain regulations which are to be considered as having the same effect as the law contained in instruction [PIK 16.01-.08 ...]." This may then be followed with a summary of the appropriate ICC regulation. An instruction in this form was approved in *Underwood v. Missouri-Kansas-Texas Rld. Co.*, 191 Kan. 338, 381 P.2d 510 (1963).

132.06

SAFETY APPLIANCE ACT—HANDBRAKES

The federal law under which the plaintiff claims the right to recover damages in this action imposes upon a railroad an absolute duty to have each railroad car that it uses or allows to be used on its line, equipped with efficient handbrakes.

This law is violated when handbrakes fail to function properly (*when used or operated in the usual and customary manner*) (*because of a defect*).

Whenever a railroad employee is (*injured*) (*killed*) in the course of (*his*) (*her*) employment and the (*injury*) (*death*) results in whole or in part from a violation of the duty imposed by the law, the plaintiff is entitled to recover damages for such (*injury*) (*death*) even though the railroad was not negligent and even though the (*plaintiff*) (*decedent*) was negligent.

Notes on Use

See 49 U.S.C. 20302(a)(1)(B) (2000). The same subsection also requires secure sill steps. See Notes on Use under PIK 4th 132.05, Safety Appliance Act—Automatic Coupler.

Comment

See Comment under PIK 4th 132.05, Safety Appliance Act—Automatic Coupler.

There are two recognized methods of showing the inefficiency of equipment. It may be established by evidence showing some particular defect, or it may be established by showing that the equipment failed to function when operated in the normal, natural, and usual manner. *Myers v. Reading Co.*, 331 U.S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615 (1947). It is sufficient to show that the brake did not work at the time of the injury, even though it may have worked both before and after the injury.

132.07

SAFETY APPLIANCE ACT—GRABIRONS

The federal law under which the plaintiff claims the right to recover damages in this action imposes upon a railroad an absolute duty to have all of the cars that it uses or allows to be used on its line, equipped with secure and adequate grabirons or handholds at the ends and sides of each car (*and on the roof at the top of the ladder on each car*).

This statute is violated (*when a car does not have the required grabirons or handholds*) (*when a grabiron or handhold on a car is not secure or adequate for use*).

Whenever a railroad employee is (*injured*) (*killed*) in the course of (*his*) (*her*) employment and the (*injury*) (*death*) results in whole or in part from a violation of the duty imposed by the law, the plaintiff is entitled to recover damages for such (*injury*) (*death*) even though the railroad was not negligent and even though the (*plaintiff*) (*decedent*) was negligent.

Notes on Use

See 49 U.S.C. 20302(a)(2) and (a)(1)(B) (2000). See generally the Notes on Use under PIK 4th 132.05, Safety Appliance Act—Automatic Coupler.

Comment

See Comment under PIK 4th 132.05, Safety Appliance Act—Automatic Coupler.

132.08

BOILER INSPECTION ACT—DUTY OF RAILROAD

The federal law under which the plaintiff claims the right to recover damages in this action imposes upon a railroad an absolute duty to have every locomotive or tender used or allowed to be used on its line, together with all parts and appurtenances of any such locomotive or tender, in proper condition and safe to operate without unnecessary danger of personal injury.

Whenever a railroad employee is (*injured*) (*killed*) in the course of (*his*) (*her*) employment and the (*injury*) (*death*) results in whole or in part from a violation of the duty imposed by this law, the plaintiff is entitled to recover damages for such (*injury*) (*death*) even though the railroad was not negligent and even though the (*plaintiff*) (*decedent*) was negligent.

Notes on Use

This instruction covers violations of 49 U.S.C. 20701 (2000), which originally was called the Boiler Inspection Act. See generally the Notes on Use under PIK 4th 132.05, Safety Appliance Act—Automatic Coupler.

Comment

See Comment under PIK 4th 132.05, Safety Appliance Act—Automatic Coupler. The effect of the Boiler Inspection Act is the same as that of the Safety Appliance Act in imposing an absolute duty on railroads. An injured employee need only prove that a locomotive was not in proper condition and safe to operate. *Lilly v. Grand Trunk R. Co.*, 317 U.S. 481, 63 S. Ct. 347, 87 L. Ed. 411 (1943).

The Boiler Inspection Act covers not only defects in construction and mechanical operation, but gives protection against the presence of dangerous objects and foreign matter. For example, in *Gowins v. Pennsylvania R. Co.*, 299 F.2d 431 (6th Cir. 1962), *cert. denied* 371 U.S. 824, 83 S. Ct. 44, 9 L. Ed. 2d 64 (1962), it was held that a trial court had erred in withdrawing from jury consideration an employee's claim, under the Boiler Inspection Act, that he had "slipped and tripped" because there had been oil on the locomotive walkways he had been required to use.

132.09

EFFECT OF COMPANY RULES AND REGULATIONS

Reference has been made in this case to certain rules adopted by the railroad for the safety of its employees. These rules were not admitted into evidence as legal standards of duty but as evidence of the degree of reasonable care to be exercised on the part of either the plaintiff or the defendant in situations to which the rules apply.

[When a rule has been customarily violated, with the knowledge of those whose duty it was to enforce the rules or to report their violations, the rule may be regarded as inoperative.]

Notes on Use

This instruction is optional and should be used only in cases in which work or safety rules are in evidence either on the question of the negligence of the railroad or on the question of the contributory negligence of the employee. The bracketed paragraph should be included only when it is contended that there has been a waiver of a rule by customary or habitual violation.

Comment

A violation of a railroad work rule may be considered by a jury as evidence of negligent conduct, either on the part of the defendant railroad or on the part of the employee, depending on the factual situation. Several cases illustrative of this point are cited below.

In a FELA case, the Kansas Supreme Court held that evidence that a section motorcar had been operated in violation of a company's speed rules was evidence of a negligent rate of speed. *Tschreppel v. Missouri-K-T. Rld. Co.*, 134 Kan. 251, 5 P.2d 845 (1931), *cert. denied* 286 U.S. 549, 52 S. Ct. 501, 76 L. Ed. 1285 (1932).

In a railway crossing case, a trial court had properly instructed a jury in substance that the observance or nonobservance of rules for the operation of trains was not conclusive as to the negligence or care of a railroad or its employees, but was only a circumstance to be considered in determining whether or not the defendant was negligent. Rules are not admissible as legal standards of duty, but are admissible as some evidence of the measure of caution that ought to be exercised in situations to which the rules apply. *Deister v. Atchison, T. & S. F. R. Co.*, 99 Kan. 525, 162 P. 282 (1917).

In an action under the FELA, a violation of a rule of a railroad company does not constitute negligence or contributory negligence as a matter of law. It is for the jury to determine whether a violation is a cause that contributed in part or in whole to the accident in issue. *Teets v. Chicago, South Shore & South Bend R.*, 238 F.2d 223 (7th Cir. 1956). It is for the jury to determine whether violation of or obedience to the rules, under the evidence as a whole, shows negligence or lack of negligence. *Frabutt v. New York C. & St. L. R. Co.*, 88 F. Supp. 821 (DC Pa. 1950).

The question of waiver of rules was discussed in an early FELA case in Kansas. In that case, it was held that disobedience with respect to a work rule may be considered on a question of the negligence of a railroad or on a question of the contributory negligence of an employee. On the question of an employee's contributory negligence, the court said: "It is presumed a rule is made for the purpose of being heeded, but

when it is so continuously or habitually disregarded as to convince jurors that it has been waived it is not only sense and justice that they may so conclude but it is the law.” For a detailed discussion of the question of rule waiver and citation of authority, see *Duncan v. Atchison, T. & S. F. R. Co.*, 86 Kan. 112, 113, 116, 117, 119 P. 356 (1911).

B. COURSE OF EMPLOYMENT**132.10****COURSE OF EMPLOYMENT AS A MATTER OF LAW**

At the time of the occurrence involved in this case the *(plaintiff) (decedent)* was in the course of *(his) (her)* employment.

Notes on Use

This instruction should be given when there is no question of fact as to whether the plaintiff was in the course of his employment. The instructions with respect to PIK 4th 132.01-132.08, Rules of Liability, contain the FELA liability requirement that a plaintiff or decedent be injured or killed “in the course of his employment.” When, as in most cases, no such issue is raised, any question concerning it should be eliminated from a jury’s consideration.

Comment

See also Comment under PIK 4th 132.11, Course of Employment as a Question of Fact.

Generally a trial court should decide the jurisdictional question of whether an employee is engaged in the furtherance of interstate commerce so that he might invoke the provisions of the federal statute. The federal decisions on this subject now cover a broad area and the question is primarily a question of law. Where the facts pertaining to an injury sustained by an employee of a carrier engaged in interstate commerce have been established, the question whether the employee was subject to the FELA is one of law. *Skanks v. Union Pac. Rld. Co.*, 155 Kan. 584, 127 P.2d 431 (1942). Only in a rare case will a railroad employee’s duties not be in the furtherance of interstate commerce by the railroad.

To maintain a claim under FELA, an employee is required to prove that the railroad was his employer, at the time of his injury. Federal Employers’ Liability Act, §§ 1 *et seq.*, 45 U.S.C.A. §§ 51 *et seq.* *Doughty v. CSX Transportation, Inc.*, 258 Kan. 493, 905 P.2d 106 (1995).

132.11

COURSE OF EMPLOYMENT AS A QUESTION OF FACT

An employee is in the course of *(his) (her)* employment when [*the employee is doing anything (he) (she) was employed to do*] [*(he) (she) is doing anything that (his) (her) employment authorizes (him) (her) to do*] [*(he) (she) is doing anything reasonably incidental to the employment*].

Notes on Use

This instruction should only be given when there is a question of fact as to whether the plaintiff was in the course of his employment at the time of the occurrence.

Comment

See also Comment under PIK 4th 132.10, Course of Employment as a Matter of Law.

The FELA has broadened considerably the traditional scope of the employer-employee relationship. This may have been because railroading requires that a wide variety of activities, otherwise personal, be done on the job.

Cases illustrating activities held to have been within an employee's scope of employment under the FELA include *Chicago, M. St. P. & P. R. Co. v. Kane*, 33 F.2d 866 (9th Cir. 1929), *cert. denied* 280 U.S. 588, 50 S. Ct. 37, 74 L. Ed. 637 (1929); *Mostyn v. Delaware, L. & W. R. Co.*, 160 F.2d 15 (2d Cir. 1947), *cert. denied* 332 U.S. 770, 68 S. Ct. 82, 92 L. Ed. 355 (1947); *O'Neil v. Vie*, 94 Okla. 68, 220 P. 853 (1923); *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799 (1958), *reh. denied* 356 U.S. 978, 78 S. Ct. 1133, 2 L. Ed. 2d 1152 (1958).

To maintain a claim under FELA, an employee was required to prove that the railroad was his employer, at the time of his injury. Federal Employers' Liability Act, §§ 1 *et seq.*, 45 U.S.C.A. §§ 51 *et seq.*; *Doughty v. CSX Transportation, Inc.*, 258 Kan. 493, 905 P.2d 106 (1995).

Where a railway employee was injured in loading a barrel of oil on a truck, which oil was used in oiling the employer's railroad engines, his right of redress was governed by the FELA and not by the Workmen's Compensation Act. *Harris v. Missouri Pac. Rld. Co.*, 158 Kan. 679, 149 P.2d 342 (1944).

A railway employee who slipped and fell while walking from the office where he checked in to the roundhouse where he worked on engines used in interstate transportation was under the FELA and not the Workmen's Compensation Act. *Williams v. Chicago, R. I. & P. R. Co.*, 155 Kan. 813, 130 P.2d 596 (1942).

The Second Circuit Court of Appeals has held that "course of employment" within FELA is not limited to actual work done but includes passage across an employer's premises to and from a place of work where it is a necessary incident to the day's work. *Morris v. Pennsylvania R. Co.*, 187 F.2d 837 (2d Cir. 1951).

132.12

RAILROAD ACTS THROUGH OFFICERS AND EMPLOYEES

The defendant railroad is a corporation and must necessarily act through its employees. The *(negligence) (conduct)* of an employee, other than the plaintiff, acting within the course of *(his) (her)* employment, is the *(negligence) (conduct)* of the railroad.

Notes on Use

With this instruction give either PIK 4th 132.10, Course of Employment as a Matter of Law or PIK 4th 132.11, Course of Employment as a Question of Fact, defining course of employment. In case scope of employment is an issue as to the railroad employee claimed to have been negligent, it is suggested that a sentence be added after the first sentence of the instruction as follows: "A corporation is responsible for the negligent acts of its officers and employees only when such persons are acting within the scope of their employment."

C. RULES OF DEFENSE

132.20

CONTRIBUTORY NEGLIGENCE AS A QUESTION OF FACT

Contributory negligence on the part of an employee shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee.

“Contributory negligence” means negligence on the part of the *(plaintiff)* *(decedent)* that contributes as a direct cause of *[(his) (her)] [(injury) (death)]*.

Notes on Use

This instruction should be given when contributory negligence is an issue of fact for the jury. The burden of proof on this issue should be set out in the issue and burden of proof instruction. See PIK 4th 106.01, Issues and Burden of Proof—Plaintiff’s Claim—Defendant’s Defense.

This instruction should not be given in Safety Appliance Act or Boiler Inspection Act cases. See PIK 4th 132.22, Contributory Negligence—Violation of Safety Appliance Act or Boiler Inspection Act.

The instruction as to the method by which damages should be adjusted for contributory negligence, PIK 4th 132.31, Diminution of Damages Because of Contributory Negligence, should also be given when contributory negligence is an issue.

Comment

The decisions restrict the effect of contributory negligence to that which is direct, or proximate, in considering the diminution of damages. *Keith v. Wheeling & L. E. Ry. Co.*, 160 F.2d 654 (6th Cir. 1947), *cert. denied* 332 U.S. 763, 68 S. Ct. 67, 92 L. Ed. 348 (1947).

See Comment to PIK 4th 132.23, No Assumption of Risk by Employee, concerning the distinction between contributory negligence (only a partial defense) and assumption of risk (no defense).

The FELA does not provide for reduction of the amount of damages payable by a liable employer through apportionment of damages between railroad and non-railroad causes. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003). There, the trial court properly instructed the jury “not to make a deduction for the contribution of non-railroad exposures” to asbestos, as long as it found defendant was negligent and that “dust exposures at [Norfolk] contributed, however slightly, to the plaintiff’s injuries.”

132.21

CONTRIBUTORY NEGLIGENCE NOT AN ISSUE

The evidence in this case fails to show contributory negligence on the part of the *(plaintiff) (decendent)*, and, therefore, you should not consider the question of contributory negligence raised by the defendant.

Notes on Use

This instruction is for use only when a jury has been told during a trial that contributory negligence is an issue, and after it has been closed, the evidence is insufficient to justify submitting the issue to a jury. It is not needed when no issue or mention of contributory negligence has been made at the trial.

See Comment under PIK 4th 132.23, No Assumption of Risk by Employee, concerning the distinction between contributory negligence (only a partial defense) and assumption of risk (no defense).

132.22

**CONTRIBUTORY NEGLIGENCE—VIOLATION OF SAFETY
APPLIANCE ACT OR BOILER INSPECTION ACT**

Under the law in this case a (*plaintiff's*) (*decedent's*) negligence neither prevents recovery nor serves to reduce the amount of any damages found to have been sustained.

Notes on Use

This instruction applies to Safety Appliance Act and Boiler Inspection Act cases and is based on 35 Stat. 66 (1908), 45 U.S.C. 53 (1964). If the case includes a cause of action based upon negligence under the FELA, the instruction must be modified to show application to only the Safety Appliance Act or Boiler Inspection Act causes of action.

Comment

The defense of contributory negligence is entirely unavailable to a railroad in an action based upon a violation of the Safety Appliance Act or Boiler Inspection Act. *Yentzer v. Pennsylvania R. Co.*, 239 F.2d 785 (3d Cir. 1957).

132.23

NO ASSUMPTION OF RISK BY EMPLOYEE

The federal law under which the plaintiff claims the right to recover in this action provides that, in any action brought against a railroad for *(an injury to) (the death of)* an employee, the employee shall not be held to have assumed the risks of *(his) (her)* employment.

Notes on Use

The instruction is applicable to actions based upon negligence under the FELA and upon violations of the Safety Appliance and Boiler Inspection Acts.

This instruction is based upon 53 Stat 1404 (1939), 45 U.S.C. 54 (2000) and 49 U.S.C. 20304 (2000).

Comment

The above instruction is optional and should be used only when assumption of risk has been stated as an issue or inferred from argument or evidence introduced during trial. The giving of an instruction that an employee had not assumed the risk of his employment has been held proper without regard to whether the defense had been asserted, although it has also been held to have been properly refused when that was not an issue. *Wantland v. Illinois Cent. R. Co.*, 237 F.2d 921 (7th Cir. 1956), *Blundell v. Atchison, Topeka & Santa Fe Ry. Co.*, 157 Cal. App. 2d 797, 322 P.2d 66 (1958). However, see *Koshorek v. Pennsylvania R. Co.*, 318 F.2d 364 (3d Cir. 1963), which involved an action under the FELA by a railroad shop employee. A judgment based on a jury verdict in favor of the railroad was reversed and a new trial granted because the trial court had failed to properly distinguish comparative negligence and assumption of risk and had failed to instruct that the employee had not assumed the risk of his employment. The case contains an excellent discussion of the doctrine of comparative negligence in FELA actions and of the abrogation of the defense of assumption of risk, which abrogation necessitates a careful distinction between the two concepts.

In a FELA case in which the Illinois Pattern Instruction (Illinois Pattern Jury Instructions—Civil No. 160.09, which is similar to PIK 4th 132.23) on “assumed risk” was given, the defendant contended there was nothing in the pleadings of evidence to justify the giving of an assumed risk instruction. The court held that the use of such a cautionary instruction is a discretionary matter for the trial court. *Graham v. Toledo, Peoria & Western R. Co.*, 35 Ill. App. 2d 234, 182 N.E.2d 889 (1962).

D. DAMAGES

132.30

FELA DAMAGES IN GENERAL

Comment

When personal injuries are involved, refer to the following instructions in addition to any instructions in this section that are particularly applicable to FELA cases:

PIK 4th 171.02, Types of Damages Allowed—Personal Injury;

PIK 4th 171.43, Aggravation of Preexisting Condition;

PIK 4th 171.45, Mortality Table—Life Expectancy.

Two special rules exclusively applicable to damages in FELA cases make additional damage instructions necessary in this chapter. The rule that contributory negligence does not bar but only serves to diminish damages must be the subject of an instruction in FELA actions in which contributory negligence is a question of fact for the jury (PIK 4th 132.31, Diminution of Damages Because of Contributory Negligence). It should be pointed out that such an instruction is not applicable to cases based upon a violation of the Safety Appliance or Boiler Inspection Acts, because contributory negligence does not diminish damages for violation of those statutes. In death actions different elements of recovery are allowed under the FELA than under Kansas law (K.S.A. 60-1904). In FELA actions PIK 4th 132.30-132.34 replace the PIK 4th 171.30 series on wrongful death. The forms of verdict and concluding instructions in Chapter 181.00 may be used in injury or death actions under the FELA.

Damage instructions in FELA actions should be modified to reflect that the dollar value of damages for loss of future earning capacity and future medical expenses should be reduced to present cash value. “Present cash value” is the sum of money which, together with the reasonable future earnings of such sum, will produce the dollar equivalent of such future damages. In short, the jury should be instructed that when such future payments are to be anticipated the verdict should be on the basis of their present value. *Gulf, C. & S. F. Ry. v. Moser*, 275 U.S. 133, 48 S. Ct. 49, 72 L. Ed. 200 (1927), conformed to (Tex. Civ.App.) 4 S.W.2d 1118. In a Federal Employers’ Liability Act action, the employer is entitled to have the jury instructed that an award for future economic loss must be on the basis of its present value. *Koser v. Atchison, Topeka & Santa Fe Ry. Co.*, 261 Kan. 46, 928 P.2d 85 (1996). Damages for future pain and suffering are not reduced to present cash value. *Texas & Pacific R. Co. v. Buckles*, 232 F.2d 257 (5th Cir. 1956) *cert. denied* 351 U.S. 984, 76 S. Ct. 1052, 100 L. Ed. 1498 (1956).

The elements of damages recoverable in FELA cases are a matter of federal law. However, the method of proof of the present value of future damages, like other questions of procedure and evidence, is to be determined by the law of the forum. *Gannaway v. Missouri-Kansas-Texas Rld. Co.*, 2 Kan. App. 2d 81, 575 P.2d 566 (1978).

The legal effect of benefits received by an employee under the Railroad Retirement Act have been fully and finally put to rest in *Eichel v. New York Central R. Co.*, 375 U.S. 253, 84 S. Ct. 316, 11 L. Ed. 2d 307 (1963). In a per curiam opinion the Court quoted from an earlier case as follows:

“The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers.... The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer.” *New York, N. H. & H. R. Co. v.*

Leary, 204 F.2d 461, 468 (1st Cir. 1953), *cert. denied* 346 U.S. 856, 74 S. Ct. 71, 98 L. Ed. 370 (1953).

Also, in the *Eichel* case, the Supreme Court discussed the value of disability benefits on the issue of malingering. It wrote:

“Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U.S.C. 228b(a)4, were considered as evidence of malingering by an employee asserting a claim under the Federal Employers’ Liability Act....”

If there are arguments or inferences that receipt of such benefits affects the merits of the case, then a precautionary instruction similar to PIK 4th 132.23, No Assumption of Risk by Employee, should be given.

In a FELA wrongful death case the Supreme Court held that the Illinois trial court erred in (1) excluding evidence of income taxes payable on the decedent’s past and estimated future earnings, and (2) in refusing to instruct the jury that their award would be nontaxable. *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980) *rev. denied* 445 U.S. 972, 100 S. Ct. 1667, 64 L. Ed. 2d 250.

A claim for negligent infliction of emotional distress may be advanced under FELA. If an employee suffers only emotional injury, it constitutes an injury resulting from the employer’s negligence only if (1) the injury was caused by fear of physical injury to the employee resulting from the employer’s conduct, and (2) the employee was within the zone of danger of physical impact. *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994) (plaintiff who suffered no physical injury not entitled to recover for emotional distress due to witnessing death of co-worker). See also *Grube v. Union Pacific R.R. Co.*, 256 Kan. 519, 886 P.2d 845 (1994).

Gottshall, *supra*, was applied in *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997), to deny recovery for fear of contracting cancer by a worker who had been exposed to asbestos as a result of defendant’s negligence but who was disease-free.

Gottshall and *Buckley*, *supra*, apply to free-standing claims of mental anguish by those who have suffered no physical injury or disease. When the worker is entitled to recover for a physical injury or disease caused in part by defendant’s negligence, the worker may also recover for related emotional distress. *Norfolk & Western R. Co. v. Ayers*, 583 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003). In *Norfolk*, plaintiffs developed the disease asbestosis in part because of defendant’s negligence in exposing them to asbestos. The court held they were entitled to recover damages resulting from a reasonable fear of developing cancer stemming from their present disease. The trial court instructed the jury, “Any plaintiff who has demonstrated that he had developed a reasonable fear of cancer is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering.” *Norfolk* suggests that defendant would be entitled to an instruction that “plaintiff must prove any alleged fear to be genuine and serious.”

While *Norfolk*, *supra*, permits recovery of damages for fear of contracting cancer, it notes that plaintiffs did not seek and the trial court did not allow damages to be recovered for the increased risk of cancer by those who have developed asbestosis. No asbestosis claimant was shown to be reasonably certain to contract cancer and most courts follow the “separate disease rule,” permitting a later action seeking additional damages if the worker subsequently contracts cancer.

132.31

**DIMINUTION OF DAMAGES BECAUSE OF
CONTRIBUTORY NEGLIGENCE**

Contributory negligence by a (*plaintiff*) (*decedent*) does not prevent recovery by the plaintiff, but does reduce (*his*) (*her*) damages.

Accordingly, if you find that the (*plaintiff's injury*) (*decedent's death*) resulted in whole or in part from the negligence of both the (*plaintiff*) (*decedent*) and the railroad, then you shall determine the damages to be awarded in the following manner:

First: Determine the amount of the plaintiff's damages in dollars without considering the effect of the negligence of the (*plaintiff*) (*decedent*).

Second: Determine what percentage the (*plaintiff's*) (*decedent's*) negligence was of the total combined negligence.

Third: Reduce the amount of the plaintiff's damages, as previously determined, by the percentage of the (*plaintiff's*) (*decedent's*) negligence.

Notes on Use

Adapt this instruction to a death action or action for personal injuries by using the proper words in parentheses. Do not give this instruction in a case based upon a violation of the Safety Appliance or Boiler Inspection Acts because contributory negligence does not diminish damages for violation of those statutes. The instruction is based upon 35 Stat. 66 (1908), 45 U.S.C. 53 (1958).

Comment

The contributory negligence of the plaintiff-employee goes only to a proportionate diminution in the amount of damages and does not bar a recovery for an injury that resulted in part from the defendant's negligence. *Albertson v. Chicago M., St. P. & P. R. Co.*, 242 Minn. 50, 64 N.W.2d 175 (1954). Contributory negligence is not a defense on the issue of liability, but may be evaluated on the issue as to the amount of damages on a comparative negligence basis. *Cordova v. Atchison, Topeka & Santa Fe Railway Co.*, 198 Cal. App. 2d 161, 18 Cal. Rptr. 144 (1961).

For Kansas authority see *Merando v. Atchison, T. & S. F. R. Co.*, 232 Kan. 404, 407, 656 P.2d 154 (1982).

The FELA does not provide for reduction of the amount of damages payable by a liable employer through apportionment of damages between railroad and non-railroad causes. *Norfolk & Western R. Co. v. Ayers*, 583 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003). There, the trial court properly instructed the jury "not to make a deduction for the contribution of non-railroad exposures" to asbestos, as long as it found defendant was negligent and that "dust exposures at [*Norfolk*] contributed, however slightly, to the plaintiff's injuries."

132.32

FELA WRONGFUL DEATH—MEASURE OF DAMAGES

If you find that the plaintiff is entitled to recover, you must then consider the amount of recovery that will fairly and justly compensate the survivors of the decedent for all pecuniary losses they have suffered and for all pecuniary losses they are reasonably certain to suffer in the future by reason of the death of the decedent, reducing all such future pecuniary losses to their present cash value.

Notes on Use

See PIK 4th 171.45 for an instruction on mortality tables. See PIK 4th 132.33, FELA—Wrongful Death—Determination of Pecuniary Loss, for factors to consider in determining pecuniary loss. When contributory negligence is an issue, PIK 4th 132.31, Diminution of Damages Because of Contributory Negligence, must also be given.

Comment

FELA is exclusive on the question of damages and places no restriction on the amount, and therefore no limitation applies except that of the damages actually sustained. *Chicago, R. I. & P. R. Co. v. Devine*, 239 U.S. 52, 36 S. Ct. 27, 60 L. Ed. 140 (1915). The state statute limiting the amount of recovery in death cases has no force and should not be considered in cases under FELA. *Dodd v. Missouri-Kansas-Texas R. Co.*, 354 Mo. 1205, 193 S.W.2d 905 (1946).

Recovery for the death of a deceased employee is restricted to the pecuniary damages sustained by his surviving dependents. *Boller v. Pennsylvania R. Co.*, 185 F. Supp. 505 (N.D. Ind. 1960). Where future payments or other future benefits are to be anticipated, the verdict should be on the basis of present value only. *Pennsylvania R. Co. v. McKinley*, 288 F.2d 262 (6th Cir. 1961). In a Federal Employers' Liability Act action, the employer is entitled to have the jury instructed that an award for future economic loss must be on the basis of its present value. *Koser v. Atchison, Topeka & Santa Fe Ry. Co.*, 261 Kan. 46, 928 P.2d 85 (1996).

Because FELA actions are governed by federal law, the division of damages among the survivors is not affected by state law. *Re Barker's Estate*, 134 Misc. 833, 237 N.Y.S. 212 (1929). The jury award should be in a lump sum to conform to 36 Stat. 291 (1910), 45 U.S.C. 59 (1958), which provides for "only one recovery." However, the problem of allocating the award among the beneficiaries is not covered by the statute and the decisions are not harmonious. It has been held proper for a jury to apportion damages among the beneficiaries where the state practice so provides. The court has a right to submit interrogatories asking what was found to be the pecuniary loss of each dependent. *Bailey v. Central Vermont Ry., Inc.*, 113 Vt. 433, 35 A.2d 365 (1943). It has been stated that because the statute is silent on the question of apportionment it has generally been interpreted as not requiring juries to make an apportionment. To do so would in many cases double the issues and make a jury investigate the domestic affairs of a deceased—a matter more properly for a court.

Apportionment has been held to be ancillary or collateral to the main issue and, hence, within the jurisdiction of the court in which the action was pending. *Stark v. Chicago, North Shore & Milwaukee Ry. Co.*, 203 F.2d 786 (7th Cir. 1953).

It has been held in Kansas that a division of funds derived from an out-of-court settlement is to be distributed as personal property according to the laws of intestate succession when an administrator enters into such a settlement with a railroad for the alleged wrongful death of one of its employees and executes a general release not specifying under what statute the settlement is made. *Holmes v. Price*, 186 Kan. 623, 352 P.2d 5 (1960). Although the claim in the *Holmes* case had been made under three Kansas acts and under the FELA, the trial court had found that there had been no evidence the settlement had been made under the federal act.

In view of the Kansas statute requiring apportionment by the court in proportion to the loss sustained by each of the heirs (K.S.A. 60-1905), it would seem that the preferable practice would be to permit the jury to return a verdict for the total damages and to require the trial judge to apportion the verdict among the beneficiaries shown to be entitled to participate in the recovery.

132.33

**FELA WRONGFUL DEATH—DETERMINATION
OF PECUNIARY LOSS**

To determine the pecuniary loss suffered by the survivor(s) as a result of the death of the decedent, you shall consider the following:

- 1. The benefits of a money value, including money, goods, and services that the decedent customarily contributed to the survivor(s);**
- 2. The decedent's earnings and *(his) (her)* probable future earnings;**
- 3. The decedent's habits of industry and thrift, *(his) (her)* health, *(his) (her)* age, and *(his) (her)* life expectancy at the time of *(his) (her)* death;**
- 4. The personal expenses of the decedent;**
- 5. The length of time the survivor(s) would probably have received benefits of money value from the decedent had *(he) (she)* lived;**
- 6. Any other facts that may aid you in determining the pecuniary loss;**
- 7. The value of any loss of care, attention, instruction, training, advice, and guidance that the decedent would probably have given to *(his) (her)* surviving minor children.**

The benefits that you may consider must be only those upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused any survivor by the death of decedent.

Notes on Use

This instruction should follow PIK 4th 132.32, FELA Wrongful Death—Measure of Damages. If there are no minor children surviving the decedent, delete subparagraph 7 of the instruction. When contributory negligence is an issue, PIK 4th 132.31, Diminution of Damages Because of Contributory Negligence, must also be given.

Comment

See Comment under PIK 4th 132.32, FELA Wrongful Death—Measure of Damages.

An instruction on damages in a death case under the FELA that told the jury to determine the pecuniary loss sustained by the widow and children by reason of the death of the decedent was approved by the Kansas Supreme Court. The jury was informed that in determining such sum it could consider the age of the decedent; his earning capacity; his disposition to contribute, to care for, and to furnish money to his wife; the ages of the children and the probable expectation of life of the parties. *Griffith v. Midland Valley R. Co.*, 100 Kan. 500, 166 P. 467 (1917), *error dismissed* 245 U.S. 633, 38 S. Ct. 133, 62 L. Ed. 522 (1917), and *cert. denied* 245 U.S. 653, 38 S. Ct. 12, 62 L. Ed. 532 (1917). The Kansas case quoted from *Norfolk and Western Ry. v. Holbrook*, 235 U.S. 625, 35 S. Ct. 143, 59 L. Ed. 392 (1915), in which it was

said that it was proper to charge a jury that it might consider the care, attention, instruction, training, advice, and guidance which the evidence showed the decedent might reasonably have been expected to give his children during their minority and to include the pecuniary value thereof in the damages assessed.

Funeral expenses are not allowable as part of the damages recoverable by the widow under the FELA for the death of her husband. However, permitting recovery for funeral expenses is not reversible error when no exception was urged. *Thompson v. Jason*, 265 S.W.2d 920 (Tex. Civ. App. 1954).

The law permits compensation for pecuniary loss sustained, but not for sorrow, loss of companionship, or loss of society. *St. Louis & S. F. R. Co. v. Duke*, 192 Fed. 306 (8th Cir. 1911).

In a FELA wrongful death case the Supreme Court held that the Illinois trial court erred in (1) excluding evidence of income taxes payable on the decedent's past and estimated future earnings, and (2) in refusing to instruct the jury that their award would be nontaxable. *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980), *rev. denied* 445 U.S. 972, 100 S. Ct. 1667, 64 L. Ed. 2d 250 (1980).

132.34

INCOME TAXES—EFFECT ON DAMAGES

In calculating damages for loss of earnings of the deceased, you should consider net earnings after income taxes rather than gross earnings.

You are also instructed that the amount of your award will not be subject to income taxes.

Notes on Use

This instruction should be given with PIK 4th 132.33, FELA Wrongful Death—Determination of Pecuniary Loss.

Comment

It is error to refuse to instruct a jury in a wrongful death FELA action that their award is not subject to income taxes. A wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies. *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980), *rev. denied* 445 U.S. 972, 100 S. Ct. 1667, 64 L. Ed. 2d 250 (1980).

132.35

**FELA WRONGFUL DEATH—MEDICAL EXPENSES—
PAIN AND SUFFERING OF DECEASED**

[If you find for the plaintiff, then the plaintiff may recover as a part of any damages any reasonable sums that the decedent necessarily paid or became liable for in obtaining medical care and treatment for *(his) (her)* injuries between the time of the accident and the time of *(his) (her)* death.]

[If you find that the decedent suffered pain because of *(his) (her)* injuries and was conscious thereof, then you may include as an award of damages an amount that would be fair and reasonable compensation for such conscious pain and suffering between the time of the accident and the time of *(his) (her)* death.]

Notes on Use

If contributory negligence is an issue, PIK 4th 132.31, Diminution of Damages Because of Contributory Negligence, must also be given. One or both of the alternative paragraphs may be given to conform to the evidence. Under 36 Stat. 291 (1910), 45 U.S.C. 59 (1964), a right of action in a person who suffered injury survives to his personal representative, but there may be only one recovery for the same injury.

Comment

Under the FELA recovery may include damages for the decedent's conscious pain during the period between the mortal injury and death, and damages for pecuniary loss to his next of kin. *St. Louis & Iron Mtn. Ry. v. Craft*, 237 U.S. 648, 35 S. Ct. 704, 59 L. Ed. 1160 (1915). Conscious pain substantially contemporaneous with death affords no basis for a separate award of damages. *St. Louis & Iron Mtn. Ry. v. Craft*, 237 U.S. 648, 35 S. Ct. 704, 59 L. Ed. 1160 (1915); *Bimberg v. Northern Pac. Ry. Co.*, 217 Minn. 187, 14 N.W.2d 410, 419 (1944), *adhered to* 217 Minn. 206, 14 N.W.2d 419, and *cert. denied* 323 U.S. 752, 55 S. Ct. 87, 89 L. Ed. 2d 602 (1944). In a suit for the death of a locomotive engineer, hospital and doctor bills could be recovered as elements of damages. *Berry v. St. Louis-San Francisco Ry. Co.*, 324 Mo. 775, 26 S.W.2d 988 (1929), *cert. denied* 281 U.S. 765, 50 S. Ct. 464, 74 L. Ed. 1173 (1930).

A. COMMON CARRIERS**141.01****DUTY OF COMMON CARRIER TO PASSENGER**

_____ (*Name of carrier*) is a common carrier.

A common carrier of passengers has the duty to exercise the highest degree of care for the safety of its passengers. Failure to do so is negligence.

Notes on Use

For authority, see *Elliott v. Chicago, Rock Island and Pac. Rld. Co.*, 203 Kan. 273, 454 P.2d 124 (1969); *Slade v. City Cabs, Inc.*, 193 Kan. 105, 392 P.2d 127 (1964); *Dryden v. Kansas City Public Service Co.*, 172 Kan. 31, 238 P.2d 501 (1951).

Comment

An elevator at a shopping mall is not a common carrier. *Summers v. Montgomery Elevator*, 243 Kan. 393, 757 P.2d 1255 (1988). Thus no heightened duty of care is owed to one riding on an elevator.

For a statutory definition of “common carrier,” see K.S.A. 66-105.

A common carrier is not an insurer of the safety of its passengers. *Cloud v. Kansas-Oklahoma Traction Co.*, 103 Kan. 249, 173 P. 338 (1918).

The doctrine of *res ipsa loquitur* may be applicable in a common carrier case. *Cloud v. Kansas-Oklahoma Traction Co.*, 103 Kan. 249, 173 P. 338 (1918).

141.02

COMMON CARRIER PASSENGER DEFINED

A passenger of a common carrier is one who intends in good faith to be a passenger and is *(in the process of boarding the carrier's vehicle) (riding or being transported in the carrier's vehicle) (alighting from the carrier's vehicle)* with the actual or implied consent of the carrier.

Notes on Use

This instruction should be used in those cases where there is an issue as to whether or not a person has acquired the status of a passenger of a common carrier.

Comment

The relationship between a common carrier of persons and the passengers originates in contract. When the passenger is delivered safely and permitted to get out of the railroad car or taxi, the contract is terminated. See *Shumate v. Vet's Cab, Inc.*, 177 Kan. 600, 281 P.2d 1071 (1955).

The duty imposed upon common carriers includes an obligation to provide facilities and assistance for alighting from the vehicle where the facts and circumstances require more facilities and assistance. *Elliott v. Chicago, Rock Island and Pac. Rld. Co.*, 203 Kan. 273, 454 P.2d 124 (1969); *King v. Vets Cab, Inc.*, 179 Kan. 379, 295 P.2d 605 (1956).

A. PERSONAL INJURIES

171.01

ELEMENTS OF PERSONAL INJURY DAMAGE

Notes on Use

This instruction has been deleted and is now incorporated in PIK 4th 171.02.

171.02

TYPES OF DAMAGES ALLOWED—PERSONAL INJURY

When determining the amount of damages sustained by the plaintiff, you must allow the amount of money that will reasonably compensate plaintiff for his/her injuries and losses resulting from the occurrence in question. These injuries and losses may include any of the following shown by the evidence:

1. MEDICAL EXPENSES. Medical expenses include the reasonable expenses of necessary medical care, hospitalization and treatment received as a result of plaintiff's injuries to date (and the medical expenses plaintiff is reasonably expected to incur in the future) [reduced to present value].

2. ECONOMIC LOSS. Economic loss includes loss of time or income and losses other than medical expenses incurred as a result of plaintiff's injuries to date (and the economic loss plaintiff is reasonably expected to incur in the future) [reduced to present value].

3. NONECONOMIC LOSS. Noneconomic loss includes pain, suffering, disabilities, disfigurement and any accompanying mental anguish suffered as a result of plaintiff's injuries to date (and the noneconomic loss plaintiff is reasonably expected to suffer in the future) [reduced to present value].

[The reasonable value of any medical care, hospitalization, or treatment incurred by the plaintiff is a question for the jury to determine. Evidence relevant to determining the reasonable value of an injured plaintiff's medical expenses may include the amount actually billed by the health care provider. The evidence also may include write-offs or other acknowledgments that something less than the amount charged has satisfied, or will satisfy, the amount billed. Accordingly, neither the amount billed nor the amount actually accepted after a write-off conclusively establishes the reasonable value of medical services.]

When determining the amount of plaintiff's damages you must consider plaintiff's age, condition of health before and after the occurrence in question, and the nature, extent and duration of the plaintiff's injuries.

If you find plaintiff suffered an injury or injuries and more than minimal discomfort as a result of the occurrence, then you must compensate the plaintiff for plaintiff's pain and suffering. There is no unit value and no mathematical formula the court can give you for determining items such as pain, suffering, disability, and mental anguish. You must establish an amount that will fairly and adequately compensate the plaintiff. This amount rests within your sound discretion.

You must itemize the amounts of damages awarded in this case on the verdict form.

Notes on Use

For authority, see K.S.A. 60-249a. This instruction combines the two separate instructions which originally appeared as 171.01 and 171.02.

The trial court should instruct the jury only on those items of damage upon which there is some evidence to base an award. The parenthetical language should be included when there is evidence of future damages. The bracketed language should be used only when evidence of present value has been introduced.

In *Martinez v. Milburn Enterprises, Inc.*, 290 Kan 572, 233 P.3d 205 (2010), the court held that the collateral source rule did not bar evidence of the amount originally billed by the health care provider for plaintiff's medical treatment or the reduced amount accepted by the provider in full satisfaction of the amount billed. Evidence of the amount billed and the reduced amount accepted are relevant to prove the reasonable value of medical treatment. If such evidence is admitted, the bracketed paragraph regarding the reasonable value of medical treatment should be used. In addition, a limiting instruction must be given. See PIK 4th 102.40, Limited Admissibility of Evidence as to One Party or Purpose.

In *Stowers v. Rimel*, 19 Kan. App. 2d 723, 875 P.2d 1002 (1994), the jury returned a verdict limited to the plaintiff's medical expenses. Because the evidence was uncontradicted that plaintiff had experienced pain and suffering, the trial court instructed the jury to resume its deliberations to consider that element of damage. On appeal, the Court of Appeals affirmed the trial court's order that the jury resume its deliberations.

Under circumstances like those presented in *Stowers*, the following instruction could be used:

In view of your verdict awarding medical expenses, the law requires that you award some amount for pain and suffering. You should resume your deliberations to determine that amount. The amount of damages rests within your sound discretion.

This pattern instruction must be revised or modified if the underlying theory to support recovery is based upon diminution or deprivation of chance to survive. See *Boody v. U.S.*, 706 F. Supp. 1458 (D. Kan. 1989), and *Donnini v. Ouano*, 15 Kan. App. 2d 517, 810 P.2d 1163 (1991). See also PIK 4th 181.05, Verdict Form—Loss of Chance Issue—Survival, and PIK 4th 123.21, Loss of Chance—Survival—Causation.

Comment

In a personal injury action, the incidence of federal or state income taxation is not a proper factor to be considered by the jury in making an award of damages. *Rediker v. Chicago, Rock Island & Pacific Rld. Co.*, 1 Kan. App. 2d 581, 590, 571 P.2d 70 (1977); *Spencer v. Eby Construction Co.*, 186 Kan. 345, 350, 350 P.2d 18 (1960).

In an action for personal injuries, the trial court should instruct the jury only on those items of damage upon which there is some evidence to base an award. It is not proper to give a general instruction on damages for "any of the following shown by the evidence," when there is no evidence to support an award for a particular item. *Wahwasuck v. Kansas Power & Light Co.*, 250 Kan. 606, 828 P.2d 923 (1992); *Garrison v. Marlatt*, 224 Kan. 390, 580 P.2d 885 (1978).

A defendant in any action is allowed to have amounts allowed for future damages reduced to present worth where there are reasonable grounds to expect that the amount awarded may be safely and profitably invested. Evidence demonstrating how to compute present worth, either by way of expert testimony or appropriate mathematical tables or formulae, is admissible in any action in which substantial future damages are claimed. *Gannaway v. Missouri-Kansas-Texas Rld. Co.*, 2 Kan. App. 2d 81, 575 P.2d 566 (1978).

Disfigurement has been defined as that which impairs or injures the beauty, symmetry or appearance of a person or thing, that which renders unsightly, misshapen or imperfect, or deforms in some manner. *Smith v. Marshall*, 225 Kan. 70, 587 P.2d 320 (1978). Evidence of a locking elbow which occurred frequently and without warning meets the definition of disfigurement. *Ratterree v. Bartlett*, 238 Kan. 11, 21, 707 P.2d 1063 (1985), citing with approval this instruction.

Impairment of an injured party's capacity to earn is relevant in calculating that party's loss of income. The amount of damages to be awarded is determined by "comparing what the injured party was capable of earning at or before the time of the injury with what the party is capable of earning after the injury." The injured party's health and physical ability before and after the injury should also be considered. *Morris v. Francisco*, 238 Kan. 71, 79, 708 P.2d 498 (1985). See also *Cerretti v. Flint Hills Rural Electric Co-op Ass'n*, 251 Kan. 347, 837 P.2d 330 (1992).

Loss of enjoyment of life is not a separate category of nonpecuniary damages in a personal injury action and it is error to submit a separate instruction, or provide a separate verdict form entry, on loss of enjoyment of life. However, in a proper case loss of enjoyment of life is a valid subcomponent or element of pain and suffering and/or disability. *Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823 (1989).

Under the rationale of *Leiker*, the trial court properly allowed plaintiff to argue loss of enjoyment of life and instructed the jury that such a loss is an element of disability, pain, and suffering. *Gregory v. Carey*, 246 Kan. 504, 514, 791 P.2d 1329 (1990).

The jury is required to itemize the amount awarded for noneconomic damages. In *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019), the limitation in K.S.A. 60-19a02 of a maximum allowable recovery for noneconomic loss was held to be unconstitutional. The court held that the limitation violated a plaintiff's inviolate right to a trial by jury because it intruded upon the jury's determination of the compensation owed to redress an injury.

Anxiety based upon a reasonable fear that an existing injury will lead to the occurrence of a disease or condition in the future is an element of recovery. For the fear to be reasonable, it is not necessary to show that the prospect of such an occurrence is a medical certainty or probability. It is sufficient if there is a showing that a substantial possibility exists for such an occurrence. *Tamplin v. Star Lumber & Supply Co.*, 251 Kan. 300, 308, 836 P.2d 1102 (1992).

A disability may be a noneconomic loss or an economic loss. If damages are awarded for pain and suffering based upon a disability, the disability is a noneconomic loss subject to a damages cap. If the damages award is for diminished earning capacity based on that disability, the loss is economic and not subject to a damages cap. Extent of diminished earning capacity is arrived at by comparing what the injured party was capable of earning at or before time of injury with what party is capable of earning after injury. *Cott v. Peppermint Twist Mgt. Co.*, 253 Kan. 452, 471, 856 P.2d 906 (1993).

Economic damages include the cost of medical care, past and future, and related benefits, *i.e.*, lost wages, loss of earning capacity, and other such losses. Noneconomic losses include claims for pain and suffering, mental anguish, injury, disfigurement not affecting earning capacity, and losses which cannot be easily expressed in dollars and cents. *McKissick v. Frye*, 255 Kan. 566, 588, 876 P.2d 1371 (1994).

In *Shirley v. Smith*, 261 Kan. 685, 933 P.2d 651 (1997), a medical malpractice case arising from an unsuccessful bone marrow operation, the court allowed the plaintiff to claim economic damages for loss of time spent by the plaintiff in self-catheterization. The court determined that loss of time was compensable as measured by the amount an employer would have paid plaintiff for the time spent on the procedure. The amount awarded was not subject to the cap for noneconomic damages.

In *Wilson v. Williams*, 261 Kan. 703, 710, 933 P.2d 757 (1997), the court allowed a per diem or mathematical formula argument by counsel in order for a jury to place value on pain and suffering. This decision overruled *Caylor v. Atchison, T. & S. F. Rly. Co.*, 190 Kan. 261, 374 P.2d 53 (1962). Even though counsel is now allowed to argue a mathematical formula for the jury to compute pain and suffering, the trial court should not provide a mathematical formula to the jury.

171.03

**TYPES OF DAMAGES ALLOWED—PERSONAL INJURY—
MEDICAL MALPRACTICE**

The Committee withdraws the instruction which originally appeared as PIK 2d 9.012. The statutes no longer treat medical malpractice actions differently from other personal injury actions. K.S.A. 60-249a requires the use of an itemized verdict form in any personal injury action. PIK 4th 171.02 may be used in medical malpractice actions.

171.04**DAMAGES FOR INCREASED INJURY RESULTING
FROM RENDERING AID**

If plaintiff sustained personal injury as a result of defendant's negligence, then plaintiff may recover damages from defendant for any additional harm which resulted from the efforts of *(other persons) (a treating physician)* to render aid to plaintiff, so long as those efforts were not performed in a negligent manner.

Notes on Use

The development of the "one-action" rule in comparative negligence litigation required revision of the instruction and limits the circumstances under which it should be used.

Comment

Before the advent of comparative fault, a negligent party could be held liable for original injuries aggravated by subsequent medical treatment irrespective of whether that treatment was done in a proper manner. *Fieser v. St. Francis Hospital & School of Nursing, Inc.*, 212 Kan. 35, 510 P.2d 145 (1973), and *Keown v. Young*, 129 Kan. 563, 283 P. 511 (1930).

Under comparative fault, all parties to an occurrence must have their fault determined in one action. *Brown v. Keill*, 224 Kan. 195, 207, 580 P.2d 867 (1978).

In *Teepak, Inc. v. Learned*, 237 Kan. 320, 699 P.2d 35 (1985), the Supreme Court applied the one-action rule to successive tortfeasors. Consequently it was necessary to limit this instruction to those situations wherein the additional harm was done in a non-negligent manner.

The one-action rule has been held inapplicable when there has been no prior judicial determination of comparative fault. For an in depth discussion of the rule, see *Mick v. Mani*, 244 Kan. 81, 766 P.2d 147 (1988).

171.05

**COLLATERAL SOURCE BENEFITS—REIMBURSEMENT
AND INDEMNIFICATION**

The Committee withdraws the instruction which originally appeared as PIK 2d 9.01B because the Kansas Supreme Court held unconstitutional the statutes upon which it was based, K.S.A. 60-3801 *et seq.* *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 850 P.2d 773 (1993). K.S.A. 60-3801 *et seq.* were repealed in 2014.

171.06

LOSS OR IMPAIRMENT OF SERVICES

If you find for the plaintiff, you may allow a sum which will constitute fair and reasonable compensation for the loss or impairment of plaintiff's ability to perform services as a *(husband) (wife)* resulting from injury sustained by *(him) (her)*.

In arriving at the amount of recovery, you should consider the loss or impairment of plaintiff's ability to perform services in the household and in the discharge of *(his) (her)* domestic duties, and the loss or impairment of plaintiff's companionship, aid, assistance, comfort and society.

Notes on Use

For authority, see K.S.A. 23-2605; *Cleveland v. Wong*, 237 Kan. 410, 701 P.2d 1301 (1985), and *Clark v. Southwestern Greyhound Lines*, 144 Kan. 344, 58 P.2d 1128 (1936). This damage element may be included as an additional paragraph to PIK 4th 171.02, Types of Damages Allowed—Personal Injury, or it may be given as a separate instruction.

The loss or impairment of plaintiff's ability to perform services in the household and in the discharge of domestic duties, aid and assistance are economic losses. The loss or impairment of plaintiff's companionship, comfort and society are noneconomic losses subject to the statutory damages cap. K.S.A. 60-19a02. If the plaintiff asserts a claim for loss or impairment of services as a spouse, the verdict form should itemize the losses between economic and noneconomic damages.

Comment

The terms "services" and "domestic duties" as used in the statutes include companionship given a husband by his wife. *Clark v. Southwestern Greyhound Lines*, 144 Kan. 344, 58 P.2d 1128 (1936). The terms include not only manual labor about the house, but also the performance of matrimonial, conjugal and connubial acts and duties, including social obligations, affection, and sexual relations. *Cleveland v. Wong*, 237 Kan. 410, 701 P.2d 1301 (1985).

B. PROPERTY DAMAGE

171.10

PERSONAL PROPERTY—WHEN REPAIRS WILL RESTORE TO ORIGINAL CONDITION

When repairs can restore the (*automobile*) (*personal property*) to its previous condition, the measure of damages is the fair and reasonable cost of the repairs (*plus a reasonable amount to compensate for loss of use of the [automobile] [personal property] while being repaired with ordinary diligence*), not to exceed the value of the property before the damage.

Comment

For authority, see *Billups v. American Surety Co.*, 173 Kan. 646, 251 P.2d 237 (1952), and *Lester v. Doyle*, 165 Kan. 354, 194 P.2d 917 (1948). See also *Nolan v. Auto Transporters*, 226 Kan. 176, 181, 597 P.2d 614 (1979), and *Venable v. Import Volkswagen, Inc.*, 214 Kan. 43, 519 P.2d 667 (1974).

In *Kansas Power & Light Co. v. Thatcher*, 14 Kan. App. 2d 613, 797 P.2d 162, *rev. denied* 247 Kan. 704 (1990), the court discussed the measure of damages if an item has no market value.

In *Warren v. Heartland Automotive Services, Inc.*, 36 Kan. App. 2d 758, 144 P.3d 73 (2006), the court ruled that in an action to recover damages for the loss of use of an automobile, the plaintiff may recover damages even if the plaintiff did not rent a substitute vehicle. In this situation, damages are measured by the reasonable rental value of a substitute vehicle, even in the absence of actual rental. However, loss-of-use damages are limited to a reasonable period of time needed to make repairs.

171.11

**PERSONAL PROPERTY—WHEN REPAIRS WILL NOT
RESTORE TO FORMER CONDITION**

When the (*automobile*) (*personal property*) cannot economically be restored to its former condition, the measure of damages is the difference between its fair and reasonable market value immediately before and immediately after the (*collision*) (*damage*).

Comment

For authority, see *Lakeview Village, Inc. v. Board of Johnson County Comm'rs*, 232 Kan. 727, 723, 658 P.2d 1008 (1983); *Venable v. Import Volkswagen, Inc.*, 214 Kan. 43, 519 P.2d 667 (1974); *Foster v. Humburg*, 180 Kan. 64, 299 P.2d 46 (1956); and *Lester v. Doyle*, 165 Kan. 354, 356, 194 P.2d 917 (1948).

Peterson v. Bachar, 193 Kan. 161, 392 P.2d 853 (1964), discusses loss of use of a vehicle constructed for special use which cannot readily be replaced.

In *Kansas Power & Light Co. v. Thatcher*, 14 Kan. App. 2d 613, 797 P.2d 162, *rev. denied* 247 Kan. 704 (1990), the court discussed the measure of damages if an item has no market value.

171.12

PERSONAL PROPERTY—HAVING NO MARKET VALUE

[When the (lost) (destroyed) personal property has no market value] [When the damaged personal property has no market value and it cannot economically be restored to its former condition], the measure of damages is its real, actual or intrinsic value. In determining this value, you may consider original value, cost of replacement, loss of use, cost of repair, condition, age, obsolescence, and other factors presented in the evidence.

Notes on Use

Only those factors shown by the evidence should be included in the instruction.

Comment

Where the item damaged has no market value, other relevant factors must be considered such as the cost of repair, the original value, the loss of use, any special value to the owner, the loss of expected profits, and the cost of replacement. Depreciation is not an element. *Kansas Power & Light Co. v. Thatcher*, 14 Kan. App. 2d 613, 797 P.2d 162, rev. denied 247 Kan. 704 (1990). In *Thatcher*, the court held that damages to a utility pole should not be reduced by a depreciation factor, because the pole had no market value and no discernible life expectancy and the utility company had no systematic program for replacing its poles.

See also *Geselle v. American Home Fire Assur. Co.*, 146 Kan. 138, 68 P.2d 1097 (1937), and *Hollinger v. Missouri, K. & T.R. Co.*, 94 Kan. 316, 146 P. 1034 (1915).

Where destroyed personal property has no market value and its sole value to its owner is as part of the owner's stock in trade, damages for its destruction cannot be based on a replacement cost which is far in excess of its original cost. *Airight Sales, Inc. v. Graves Truck Lines, Inc.*, 207 Kan. 753, 486 P.2d 835 (1971).

For loss of use of vehicle that was constructed for special use and that cannot readily be replaced, see *Peterson v. Bachar*, 193 Kan. 161, 392 P.2d 853 (1964).

In *Burgess v. Shampooch Pet Industries, Inc.*, 35 Kan. App. 2d 458, 131 P.3d 1248 (2006), the court ruled that for purposes of determining the measure of damages, a pet dog is personal property. Under the facts of the case, the court determined that a 13-year-old pet dog had no discernable market value. The court held that when an injured pet dog with no discernable market value is restored to its previous health, the measure of damages may include, but is not limited to, the reasonable and customary cost of necessary veterinary care and treatment.

171.20

REAL ESTATE—PERMANENT DAMAGE

When damage to real estate is permanent or irreparable, the measure of damages is the difference between the fair and reasonable market value of the property as a whole, including the improvements thereon, immediately before and immediately after the injury.

Fair and reasonable market value is that amount which would be paid under normal circumstances on the free and open market, in the usual course of dealings, by a willing buyer not forced to buy, and which amount would be acceptable to a willing seller not forced to sell.

Comment

For authority, see *Williams v. Amoco Production Co.*, 241 Kan. 102, 110, 734 P.2d 1113 (1987); *Foster v. Humburg*, 180 Kan. 64, 68, 299 P.2d 46 (1956); and *Kiser v. Phillips Pipe Line Co.*, 141 Kan. 333, 41 P.2d 1010 (1935).

The dichotomy of “temporary” versus “permanent” injury is inappropriate for measuring damages sought for negligent injury to or destruction of trees. *Evenson v. Lilley*, 295 Kan. 43, 282 P.3d 610 (2012). Generally, the measure of damages is the difference between the market value of the land immediately before and after the damage. However, this is not an inflexible rule, and the parties may present evidence supporting alternative theories of damages, such as when trees have a value independent of their value to the land, such as loss of income from fruit trees or the sentimental value of particular trees. In *Evenson*, plaintiffs failed to show a quality that made the damaged trees unique, either in intrinsic value or revenue producing value and were not entitled to replacement cost.

171.21

**REAL ESTATE—WHEN REPAIRS WILL RESTORE
TO ORIGINAL CONDITION**

When damage to real estate is temporary and of such a character that the property can be restored to its original condition, the measure of damages is the reasonable cost of repair necessary to restore it to its original condition, [plus a reasonable amount to compensate for (*loss of use*) (*loss of rental value*) of the property while repairs are being made with reasonable diligence], but not to exceed its fair and reasonable market value before the injury.

Notes on Use

The bracketed section should be used only when evidence of loss of use or loss of rental value has been introduced.

Comment

For authority, see *Anderson v. Rexroad*, 180 Kan. 505, 306 P.2d 137 (1957); *Foster v. Humburg*, 180 Kan. 64, 299 P.2d 46 (1956); and *Kiser v. Phillips Pipe Line Co.*, 141 Kan. 333, 41 P.2d 1010 (1935).

In *McBride v. Dice*, 23 Kan. App. 2d 380, 930 P.2d 631 (1997), the Kansas Court of Appeals held that damages for inconvenience and discomfort are not recoverable in an action to recover for property damages or loss of use of property.

The dichotomy of “temporary” versus “permanent” injury is inappropriate for measuring damages sought for negligent injury to or destruction of trees. *Evenson v. Lilley*, 295 Kan. 43, 282 P.3d 610 (2012). Generally, the measure of damages is the difference between the market value of the land immediately before and after the damage. However, this is not an inflexible rule, and the parties may present evidence supporting alternative theories of damages, such as when trees have a value independent of their value to the land, such as loss of income from fruit trees or the sentimental value of particular trees. In *Evenson*, plaintiffs failed to show a quality that made the damaged trees unique, either in intrinsic value or revenue producing value and were not entitled to replacement cost.

C. WRONGFUL DEATH**171.30****WRONGFUL DEATH OF SPOUSE**

If you find plaintiff is entitled to recover damages, you should allow the amount of money that will reasonably compensate plaintiff for the loss caused by defendant. There are two types of damages you may award: economic and noneconomic.

Economic damages include:

- 1. Loss of marital care, attention, advice, counsel, or protection.**
- 2. Loss of earnings you find the deceased would have provided.**
- 3. Expenses for the care of the deceased caused by the injury.**
- 4. Reasonable funeral expenses.**

For items 1 and 2 above you should allow an amount that you believe would be equivalent to the benefit plaintiff could reasonably have expected to receive from the continued life of the deceased.

Noneconomic damages include:

- 1. Mental anguish, suffering, or bereavement.**
- 2. Loss of society, loss of comfort, or loss of companionship.**

For noneconomic damages there is no unit value and no mathematical formula the court can give you. You should allow an amount that you find to be fair and just under all the facts and circumstances.

You will be given a verdict form in which you must itemize the amount of damages awarded for losses to date and the amount of damages awarded for future losses.

Notes on Use

For authority, see K.S.A. 60-1903 and K.S.A. 60-1904. This instruction has been modified so that the elements of damage included in the instruction conform with the elements of damage included in K.S.A. 60-1904.

The court should instruct the jury only on those items of damages for which there is some evidence to base an award. However, it is important to note that the elements of damage included in K.S.A. 60-1904 are nonexclusive. If the trial court finds that the evidence supports additional elements of damage not

included in the statute, the court should include the additional elements of damage in the instruction to the jury.

Although the statute uses the terms “pecuniary loss” and “nonpecuniary loss,” the Committee has used the terms “economic loss” and “noneconomic loss” in order to be consistent with PIK 4th 171.02 and because these terms are better understood by the jury. There is no meaningful distinction between pecuniary loss and economic loss.

The jury is required to separately state the amount of damages allowed for economic and noneconomic loss. A verdict form that separates these two types of damages should be submitted to the jury. K.S.A. 60-1903 limits noneconomic damages in wrongful death litigation to \$250,000 and provides the jury is not to be informed of the limitation.

K.S.A. 60-1903 was found to be constitutional in *Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823 (1989). The *Hilburn* decision, holding the statutory limit on noneconomic damages in personal injury cases to be unconstitutional, did not address the statutory limit on noneconomic damages in wrongful death actions. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019).

If an action is brought by, or on behalf of, more than one heir, the following may be added to the instruction:

“The court will determine how any amount you allow will be divided among the heirs.”

A separate survival action may be justified for some deaths. K.S.A. 60-1801. When an action for wrongful death is joined with an action brought by the personal representative of the deceased for damages sustained during the deceased’s lifetime, appropriate parts of PIK 4th 171.02 as well as this instruction should be given.

If an action is brought for the wrongful death of a spouse who is also a parent, the language of PIK 4th 171.30 and appropriate elements of PIK 4th 171.31 can be merged to avoid repetition.

Comment

Nonpecuniary damages generally are intangible in nature such as mental anguish, bereavement, loss of society and loss of companionship. Pecuniary damages are “such as can be estimated in and compensated by money.” If the jury verdict, after any adjustment for comparative fault, results in an award of nonpecuniary damages in excess of the statutory limit, the court must enter judgment for nonpecuniary damages in the amount of the statutory limit. *McCart v. Muir*, 230 Kan. 618, 641 P.2d 384 (1982).

When an action for wrongful death is joined with a survival action for damages sustained during the deceased’s lifetime, the failure to instruct on both types of damages is clearly erroneous. *Putter v. Bowman*, 7 Kan. App. 2d 323, 326, 641 P.2d 411 (1982).

When a plaintiff has shown an actual loss of services, attention, care, advice, protection, and educational, physical, and moral training and guidance, and the extent thereof, a jury is not precluded from considering such items in determining pecuniary damages even though no actual dollar evidence of value was presented. Such services are valuable per se and pecuniary in nature. *Wentling v. Medical Anesthesia Services*, 237 Kan. 503, 701 P.2d 939 (1985).

In *Cerretti v. Flint Hills Rural Electric Co-op Ass’n*, 251 Kan. 347, 365, 837 P.2d 330 (1992), the trial court instructed the jury that pecuniary damages for the wrongful death of a spouse included loss of services, attention, marital care, advice and protection, and loss of earnings the spouse would have provided. On appeal, the court determined that these elements of pecuniary damages were supported by the evidence.

In *Wilson v. Williams*, 261 Kan. 703, 710, 933 P.2d 757 (1997), the court allowed a per diem or mathematical formula argument by counsel in order for a jury to place value on pain and suffering. This decision overruled *Caylor v. Atchison, T. & S. F. Rly. Co.*, 190 Kan. 261, 374 P.2d 53 (1962). Even though

counsel is now allowed to argue a mathematical formula for the jury to compute pain and suffering, the trial court should not provide a mathematical formula to the jury.

A settlement with a defendant who might be held liable for a proportional share of the damages for a wrongful death does not diminish the plaintiff's right to recover judgment up to the statutory limit. *Adams v. Via Christi Regional Medical Center*, 270 Kan. 824, Syl. ¶ 4, 19 P.3d 132 (2001).

171.31

WRONGFUL DEATH OF PARENT

If you find plaintiff is entitled to recover damages, you should allow the amount of money that will reasonably compensate plaintiff for the loss caused by defendant. There are two types of damages you may award: economic and noneconomic.

Economic damages include:

- 1. Loss of parental care, training, guidance, education, or protection.**
- 2. Loss of earnings you find the deceased would have provided.**
- 3. Expenses for the care of the deceased caused by the injury.**
- 4. Reasonable funeral expenses.**

For items 1 and 2 above you should allow an amount that you believe would be equivalent to the benefit plaintiff could reasonably have expected to receive from the continued life of the deceased.

Noneconomic damages include:

- 1. Mental anguish, suffering, or bereavement.**
- 2. Loss of society, loss of comfort, or loss of companionship.**

For noneconomic damages there is no unit value and no mathematical formula the court can give you. You should allow an amount that you find to be fair and just under all the facts and circumstances.

You will be given a verdict form in which you must itemize the amount of damages awarded for losses to date and the amount of damages awarded for future losses.

Notes on Use

For authority, see K.S.A. 60-1903 and K.S.A. 60-1904. This instruction has been modified so that the elements of damage included in the instruction conform with the elements of damage included in K.S.A. 60-1904.

The court should instruct the jury only on those items of damages for which there is some evidence to base an award. However, it is important to note that the elements of damage included in K.S.A. 60-1904 are nonexclusive. If the trial court finds that the evidence supports additional elements of damage not included in the statute, the court should include the additional elements of damage in the instruction to the jury.

Although the statute uses the terms “pecuniary loss” and “nonpecuniary loss,” the Committee has used the terms “economic loss” and “noneconomic loss” in order to be consistent with PIK 4th 171.02 and because these terms are better understood by the jury. There is no meaningful distinction between pecuniary loss and economic loss.

The jury is required to separately state the amount of damages allowed for economic and noneconomic loss. A verdict form that separates these two types of damages should be submitted to the jury. K.S.A. 60-1903 limits noneconomic damages in wrongful death litigation to \$250,000 and provides the jury is not to be informed of the limitation.

K.S.A. 60-1903 was found to be constitutional in *Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823 (1989). The *Hilburn* decision, holding the statutory limit on noneconomic damages in personal injury cases to be unconstitutional, did not address the statutory limit on noneconomic damages in wrongful death actions. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019).

If an action is brought by, or on behalf of, more than one heir, the following may be added to the instruction:

“The court will determine how any amount you allow will be divided among the heirs.”

A separate survival action may be justified for some deaths. K.S.A. 60-1801. When an action for wrongful death is joined with an action brought by the personal representative of the deceased for damages sustained during the deceased’s lifetime, appropriate parts of PIK 4th 171.02 as well as this instruction should be given.

If an action is brought for the wrongful death of a spouse who is also a parent, the language of PIK 4th 171.30 and appropriate elements of PIK 4th 171.31 can be merged to avoid repetition.

Comment

Nonpecuniary damages generally are intangible in nature such as mental anguish, bereavement, loss of society and loss of companionship. Pecuniary damages are “such as can be estimated in and compensated by money.” If the jury verdict, after any adjustment for comparative fault, results in an award of nonpecuniary damages in excess of the statutory limit, the court must enter judgment for nonpecuniary damages in the amount of the statutory limit. *McCart v. Muir*, 230 Kan. 618, 641 P.2d 384 (1982).

When an action for wrongful death is joined with a survival action for damages sustained during the deceased’s lifetime, the failure to instruct on both types of damages is clearly erroneous. *Putter v. Bowman*, 7 Kan. App. 2d 323, 326, 641 P.2d 411 (1982).

When a plaintiff has shown an actual loss of services, attention, care, advice, protection, and educational, physical, and moral training and guidance, and the extent thereof, a jury is not precluded from considering such items in determining pecuniary damages even though no actual dollar evidence of value was presented. Such services are valuable per se and pecuniary in nature. *Wentling v. Medical Anesthesia Services*, 237 Kan. 503, 701 P.2d 939 (1985).

In *Cerretti v. Flint Hills Rural Electric Co-op Ass’n*, 251 Kan. 347, 365, 837 P.2d 330 (1992), the trial court instructed the jury that the children’s pecuniary damages for the wrongful death of their mother included loss of services, attention, parental care, advice and protection, loss of their mother’s nurturing, loss of the educational assistance of their mother, loss of the value of a complete family, and loss of financial support that the mother would have provided during the children’s minority. On appeal, the court determined that these elements of pecuniary damages were supported by the evidence.

A child’s pecuniary damages are not limited to the loss of financial support the decedent would have provided during the child’s minority. *Lattera v. Treaster*, 17 Kan. App. 2d 714, 844 P.2d 724 (1992).

In *Wilson v. Williams*, 261 Kan. 703, 710, 933 P.2d 757 (1997), the court allowed a per diem or mathematical formula argument by counsel in order for a jury to place value on pain and suffering. This decision overruled *Caylor v. Atchison, T. & S. F. Rly. Co.*, 190 Kan. 261, 374 P.2d 53 (1962). Even though

counsel is now allowed to argue a mathematical formula for the jury to compute pain and suffering, the trial court should not provide a mathematical formula to the jury.

A settlement with a defendant who might be held liable for a proportional share of the damages for a wrongful death does not diminish the plaintiff's right to recover judgment up to the statutory limit. *Adams v. Via Christi Regional Medical Center*, 270 Kan. 824, Syl. ¶ 4, 19 P.3d 132 (2001).

171.32

WRONGFUL DEATH OF A CHILD

If you find plaintiff is entitled to recover damages, you should allow the amount of money that will reasonably compensate plaintiff for the loss caused by defendant. There are two types of damages you may award: economic and noneconomic.

Economic damages include:

- 1. Loss of filial care, attention, or protection.**
- 2. Loss of earnings you find the child would have contributed to the parent(s) during the remainder of the child's lifetime.**
- 3. Expenses for the care of the deceased caused by the injury.**
- 4. Reasonable funeral expenses.**

For items 1 and 2 above you should allow an amount that you believe would be equivalent to the benefit plaintiff could reasonably have expected to receive from the continued life of the deceased.

Noneconomic damages include:

- 1. Mental anguish, suffering, or bereavement.**
- 2. Loss of society, loss of comfort, or loss of companionship.**

For noneconomic damages there is no unit value and no mathematical formula the court can give you. You should allow an amount that you find to be fair and just under all the facts and circumstances.

You will be given a verdict form in which you must itemize the amount of damages awarded for losses to date and the amount of damages awarded for future losses.

Notes on Use

For authority, see K.S.A. 60-1903 and K.S.A. 60-1904. This instruction has been modified so that the elements of damage included in the instruction conform with the elements of damage included in K.S.A. 60-1904.

The court should instruct the jury only on those items of damages for which there is some evidence to base an award. However, it is important to note that the elements of damage included in K.S.A. 60-1904 are nonexclusive. If the trial court finds that the evidence supports additional elements of damage not included in the statute, the court should include the additional elements of damage in the instruction to the jury.

Although the statute uses the terms “pecuniary loss” and “nonpecuniary loss,” the Committee has used the terms “economic loss” and “noneconomic loss” in order to be consistent with PIK 4th 171.02 and because these terms are better understood by the jury. There is no meaningful distinction between pecuniary loss and economic loss.

The jury is required to separately state the amount of damages allowed for economic and noneconomic loss. A verdict form that separates these two types of damages should be submitted to the jury. K.S.A. 60-1903 limits noneconomic damages in wrongful death litigation to \$250,000 and provides the jury is not to be informed of the limitation.

K.S.A. 60-1903 was found to be constitutional in *Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823 (1989). The *Hilburn* decision, holding the statutory limit on noneconomic damages in personal injury cases to be unconstitutional, did not address the statutory limit on noneconomic damages in wrongful death actions. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019).

If an action is brought by, or on behalf of, more than one heir, the following may be added to the instruction:

“The court will determine how any amount you allow will be divided among the heirs.”

A separate survival action may be justified for some deaths. K.S.A. 60-1801. When an action for wrongful death is joined with an action brought by the personal representative of the deceased for damages sustained during the deceased’s lifetime, appropriate parts of PIK 4th 171.02 as well as this instruction should be given.

Comment

Nonpecuniary damages generally are intangible in nature such as mental anguish, bereavement, loss of society and loss of companionship. Pecuniary damages are “such as can be estimated in and compensated by money.” If the jury verdict, after any adjustment for comparative fault, results in an award of nonpecuniary damages in excess of the statutory limit, the court must enter judgment for nonpecuniary damages in the amount of the statutory limit. *McCart v. Muir*, 230 Kan. 618, 641 P.2d 384 (1982).

When an action for wrongful death is joined with a survival action for damages sustained during the deceased’s lifetime, the failure to instruct on both types of damages is clearly erroneous. *Putter v. Bowman*, 7 Kan. App. 2d 323, 326, 641 P.2d 411 (1982).

When a plaintiff has shown an actual loss of services, attention, care, advice, protection, and educational, physical, and moral training and guidance, and the extent thereof, a jury is not precluded from considering such items in determining pecuniary damages even though no actual dollar evidence of value was presented. Such services are valuable per se and pecuniary in nature. *Wentling v. Medical Anesthesia Services*, 237 Kan. 503, 701 P.2d 939 (1985).

In *Wilson v. Williams*, 261 Kan. 703, 710, 933 P.2d 757 (1997), the court allowed a per diem or mathematical formula argument by counsel in order for a jury to place value on pain and suffering. This decision overruled *Caylor v. Atchison, T. & S. F. Rly. Co.*, 190 Kan. 261, 374 P.2d 53 (1962). Even though counsel is now allowed to argue a mathematical formula for the jury to compute pain and suffering, the trial court should not provide a mathematical formula to the jury.

In *Howell v. Calvert*, 268 Kan. 698, 1 P.3d 310 (2000), an action for the wrongful death of a child, the trial court rejected the plaintiff’s request to instruct the jury that pecuniary damages included loss of care and nurturing, loss of aid and assistance, loss of counsel and advice, loss of continued family relationship, and loss of enjoyment and entertainment. On appeal, the Kansas Supreme Court upheld the trial court’s decision and determined that the requested instruction went beyond the traditional definition of pecuniary loss for the wrongful death of a child.

A settlement with a defendant who might be held liable for a proportional share of the damages for a wrongful death does not diminish the plaintiff’s right to recover judgment up to the statutory limit. *Adams v. Via Christi Regional Medical Center*, 270 Kan. 824, Syl. ¶ 4, 19 P.3d 132 (2001).

171.33
WRONGFUL DEATH OF PERSON OTHER THAN
SPOUSE, PARENT OR CHILD

If you find plaintiff is entitled to recover damages, you should allow the amount of money that will reasonably compensate plaintiff for the loss caused by defendant. There are two types of damages you may award: economic and noneconomic.

Economic damages include:

- 1. Loss of services, loss of attention, loss of advice, and loss of protection.**
- 2. Loss of earnings you find the deceased would have contributed to the plaintiff during the remainder of the plaintiff's expected lifetime.**
- 3. Expenses for the care of the deceased caused by the injury.**
- 4. Reasonable funeral expenses.**

For items 1 and 2 above you should allow an amount that you believe would be equivalent to the benefit plaintiff could reasonably have expected to receive from the continued life of the deceased.

Noneconomic damages include:

- 1. Mental anguish, suffering, or bereavement.**
- 2. Loss of society, loss of comfort, or loss of companionship.**

For noneconomic damages there is no unit value and no mathematical formula the court can give you. You should allow an amount that you find to be fair and just under all the facts and circumstances.

You will be given a verdict form in which you must itemize the amount of damages awarded for losses to date and the amount of damages awarded for future losses.

Notes on Use

For authority, see K.S.A. 60-1903. Although the statute uses the terms “pecuniary loss” and “nonpecuniary loss,” the Committee has used the same terms which appear in PIK 4th 171.02 in the interest of consistency. There appears to be no meaningful distinction between pecuniary loss and economic loss.

The court should instruct the jury only on those items of damages for which there is some evidence to base an award.

K.S.A. 60-1903 limits nonpecuniary loss in wrongful death litigation to \$250,000 and provides the jury is not to be informed of the limitation. This statute was found to be constitutional in *Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823 (1989). The *Hilburn* decision, holding the statutory limit on noneconomic damages in personal injury cases to be unconstitutional, did not address the statutory limit on noneconomic damages in wrongful death actions. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019).

A settlement with a defendant who might be held liable for a proportional share of the damages for wrongful death does not diminish the plaintiff’s right to recover judgment up to the statutory limit. *Adams v. Via Christi Regional Medical Center*, 270 Kan. 824, Syl. ¶ 4, 19 P.3d 132 (2001).

The jury is required to separately state the amount of damages allowed for economic and noneconomic damages. A verdict form that separates these two types of damages should be submitted to the jury.

If an action is brought by, or on behalf of, more than one heir, the following may be added to the instruction:

“The court will determine how any amount you allow will be divided among the heirs.”

When an action for wrongful death is joined with an action for damages sustained during the deceased’s lifetime, brought by the personal representative of a deceased, appropriate parts of PIK 4th 171.02 as well as this instruction should be given. The failure to do so under such circumstances is clearly erroneous. See *Putter v. Bowman*, 7 Kan. App. 2d 323, 326, 641 P.2d 411 (1982).

Comment

If the jury verdict, after any adjustment for comparative fault, results in an award of nonpecuniary damages in excess of the statutory limit, the court must enter judgment for nonpecuniary damages in the amount of the statutory limit. *McCart v. Muir*, 230 Kan. 618, 641 P.2d 384 (1982).

The wrongful death statutes are K.S.A. 60-1901 *et seq.* A separate survival action may be justified for some deaths. K.S.A. 60-1801; *Flowers v. Marshall*, 208 Kan. 900, 494 P.2d 1184 (1972).

When a plaintiff has shown an actual loss of services, care, advice, training, and guidance, and the extent thereof, a jury is not precluded from considering such items in determining pecuniary damages even though no actual dollar evidence of value was presented. Such services are valuable per se and pecuniary in nature. *Wentling v. Medical Anesthesia Services*, 237 Kan. 503, 701 P.2d 939 (1985). See also *Cerretti v. Flint Hills Rural Electric Co-op Ass’n*, 251 Kan. 347, 365, 837 P.2d 330 (1992).

The terms “services” and “domestic duties” include not only manual labor about the house, but also the performance of matrimonial, conjugal and connubial acts and duties, including social obligations, affection, and sexual relations. *Cleveland v. Wong*, 237 Kan. 410, 701 P.2d 1301 (1985).

D. MISCELLANEOUS DAMAGE INSTRUCTIONS**171.40****MEASURE OF DAMAGES—PERSONAL OR
PROPERTY—SHORT FORM**

If you find for the plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate the plaintiff for the (*injuries and*) damages you believe plaintiff sustained as a result of the occurrence complained of by plaintiff.

Comment

For authority, see *Foster v. Humburg*, 180 Kan. 64, 68, 299 P.2d 46 (1956), and *Billups v. American Surety Co.*, 173 Kan. 646, 649, 251 P.2d 237 (1952).

There may be occasions when this short form will suffice. On other occasions more specific instructions as to measure of damages may be used. This instruction was cited with approval in *EF Hutton & Co. v. Heim*, 236 Kan. 603, 615, 694 P.2d 445 (1985).

All measures of damages should produce the same result, but the one that most appropriately fits the circumstances of the case should be used.

“Damages for personal injuries cannot be definitely assessed by any single method of measurement or by any scientifically accurate combination of methods known to the legal profession, but all known methods which are helpful in determining actual loss or damage should be employed in aid of the judicial process, or effort, designed to render a reasonably just award.” *Young v. Kansas City Public Service Co.*, 156 Kan. 624, 135 P.2d 551 (1943).

In a breach of contract case, the court held it was not error for the trial court to give PIK 2d 9.40 rather than PIK 2d 18.07 [PIK 4th 171.40 and PIK 4th 124.16, respectively], Measure of Damages for Breach of Contract. *Tomson v. Stephan*, 705 F. Supp. 530 (D. Kan. 1989).

171.41

DAMAGES NOT AN ISSUE

The amount of damages sustained by the plaintiff is not an issue for you to decide. You need only decide the issue of fault.

The fact that the amount of plaintiff's damages has already been determined should not influence you in any way as you determine the issue submitted to you.

Notes on Use

This instruction may be given when the amount of damages has been agreed by the parties or determined by the court.

171.42

DUTY TO MITIGATE DAMAGES

In determining the amount of damages sustained by plaintiff, you should not include any loss which plaintiff could have prevented by reasonable care and diligence exercised by plaintiff after the loss occurred.

Notes on Use

The instruction should be given only where evidence has been introduced tending to prove that plaintiff failed to mitigate damages.

Comment

Duty to mitigate is discussed and explained in *Theis v. duPont, Glore Forgan, Inc.*, 212 Kan. 301, 510 P.2d 1212 (1973); *Richards Aircraft Sales, Inc. v. Vaughn*, 203 Kan. 967, 457 P.2d 691 (1969); and *Cain v. Grosshans & Petersen, Inc.*, 196 Kan. 497, 413 P.2d 98 (1966).

Only reasonable efforts are required to mitigate damages. *Iseman v. Kansas Gas & Electric Co.*, 222 Kan. 644, 567 P.2d 856 (1977); *Steele v. J. I. Case Co.*, 197 Kan. 554, 565, 419 P.2d 902 (1966).

The defendant has the burden of proving the plaintiff failed to mitigate his damages. *Rockey v. Bacon*, 205 Kan. 578, 470 P.2d 804 (1970).

This rule does not require a person to anticipate negligence. *Hampton v. State Highway Commission*, 209 Kan. 565, 498 P.2d 236 (1972).

Authority for this instruction, as it pertains to damages to property, may be found in *First Nat'l Bank v. Milford*, 239 Kan. 151, 718 P.2d 1291 (1986), and *Schraft v. Leis*, 236 Kan. 28, 686 P.2d 865 (1984).

Authority for this instruction, as it pertains to injury to a person, may be found in *Merrick v. Missouri-K.-T. Rld. Co.*, 141 Kan. 591, 42 P.2d 950 (1935); *Gibson v. Midland V. R. Co.*, 117 Kan. 673, 233 P. 116 (1925), and *Strong v. Iron and Metal Co.*, 109 Kan. 117, 198 P. 182 (1921).

171.43

AGGRAVATION OF PREEXISTING CONDITION

Plaintiff is not entitled to recover for any physical ailment, defect, or disability that existed prior to the occurrence. However, if the plaintiff had a preexisting physical ailment, defect or disability and you find this condition was aggravated or made active causing increased suffering or disability, then the plaintiff is entitled to recover for such increased suffering and disability.

Notes on Use

This instruction is consistent with *Cott v. Peppermint Twist Mgt. Co.*, 253 Kan. 452, 856 P.2d 906 (1993); *Rowe v. Maule Drug Co.*, 196 Kan. 489, 492, 413 P.2d 104 (1966); and *Knoblock v. Morris*, 169 Kan. 540, 220 P.2d 171 (1950). This instruction is proper only when there is an issue as to whether the present condition of the injured party is the consequence of a preexisting condition.

171.44

PUNITIVE DAMAGES

In this case the plaintiff claims the defendant acted in a *(willful) (wanton) (fraudulent) (malicious)* manner toward plaintiff. If you award the plaintiff actual damages, then you may consider whether punitive damages should be allowed. Punitive damages may be allowed in the jury's discretion to punish a defendant and to deter others from like conduct.

The plaintiff must prove by clear and convincing evidence that the defendant acted in a *(willful) (wanton) (fraudulent) (malicious)* manner toward plaintiff. Evidence is clear and convincing if it shows that the truth of the fact asserted is highly probable.

If you find the defendant did one or more of the acts claimed by the plaintiff you should then determine whether the plaintiff has presented clear and convincing evidence that the defendant acted in a *(willful) (wanton) (fraudulent) (malicious)* manner toward plaintiff. If you determine punitive damages should be allowed, your finding must be entered in the verdict form. After the trial, the court will conduct a separate hearing to determine the amount of punitive damages to be allowed.

Notes on Use

For applicable instructions, see PIK 4th 103.03, Wanton Conduct Defined; PIK 4th 103.04, Willful Conduct Defined; PIK 4th 103.05, Malice Defined; and PIK 4th 127.40, Fraud—Elements.

K.S.A. 60-3701 *et seq.* provides in any civil action the jury will no longer fix the amount of punitive damages. If the jury determines punitive damages are recoverable, then the court will decide the amount to be awarded. This procedure was held to be constitutional in *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993).

Comment

PIK 3d 171.44 [now PIK 4th 171.44] was cited with approval in *York v. InTrust Bank, N.A.*, 265 Kan. 271, 307, 962 P.2d 405 (1998).

An instruction substantially in the language of PIK 2d 9.44 [PIK 4th 171.44] was approved in *Dold v. Sherow*, 220 Kan. 350, 552 P.2d 945 (1976).

A verdict for actual damages is essential to the recovery of punitive damages. *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 208, 4 P.3d 1149 (2000).

The nature and enormity of the wrong together with mitigating circumstances should be considered in assessing punitive damages. *Henderson v. Hassur*, 225 Kan. 678, 694, 594 P.2d 650 (1979); *Sanders v. Park Towne, Ltd.*, 2 Kan. App. 2d 313, 319, 578 P.2d 1131 (1978); *Will v. Hughes*, 172 Kan. 45, 238 P.2d 478 (1951).

Generally, damages for breach of contract are limited to pecuniary losses sustained, and exemplary or punitive damages are not recoverable, in absence of an independent tort or wrong causing additional injury. *Mabery v. Western Casualty and Surety Co.*, 173 Kan. 586, 250 P.2d 824 (1952).

For what constitutes wantonness such as will justify an instruction on punitive damages see *Cerretti v. Flint Hills Rural Elec. Co-op Ass'n*, 251 Kan. 347, 837 P.2d 330 (1992), and *Folks v. Kansas Power & Light Co.*, 243 Kan. 57, 755 P.2d 1319 (1988).

Authority for punitive damages in other types of cases may be found in *Will v. Hughes*, 172 Kan. 45, 238 P.2d 478 (1951) (willful and malicious acts); *Hammargren v. Montgomery Ward & Co.*, 172 Kan. 484, 241 P.2d 1192 (1952) (false imprisonment with malice); *Watkins v. Layton*, 182 Kan. 702, 324 P.2d 130 (1958) (reckless indifference to rights of others in conversion of personal property); *McCarthy v. Tetyak*, 184 Kan. 126, 334 P.2d 379 (1959) (willful misrepresentation); *Corwine v. Maracaibo Oil Exploration Corp.*, 184 Kan. 151, 334 P.2d 419 (1959) (violation of law evincing a reckless disregard of rights of others); *Jensen v. Sierra Petroleum Co.*, 189 Kan. 472, 370 P.2d 425 (1962) (knowingly permitting oil and refuse to escape and drain into water supply of plaintiff's cattle); *Kohler v. Kansas Power & Light Co.*, 192 Kan. 226, 387 P.2d 149 (1963) (wrongfully disconnecting electric current causing meat in freezer to spoil); *Ford v. Guarantee Abstract & Title Co.*, 220 Kan. 244, 553 P.2d 254 (1976) (punitive damages may be awarded for breach of fiduciary duty showing such gross neglect as to evince reckless indifference of rights of others); *Monroe v. Darr*, 221 Kan. 281, 559 P.2d 322 (1977) (invasion of privacy); and *Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.*, 226 Kan. 70, 77, 596 P.2d 816 (1979) (breach of fiduciary duty).

Punitive damages as well as actual damages may be recovered where a breach of a fiduciary duty is involved. *Newton v. Hornblower, Inc.*, 224 Kan. 506, 524, 582 P.2d 1136 (1978).

Actual damages recovered, the defendant's financial condition and the probable litigation expenses, may be considered in fixing an award of punitive damages. See *Henderson v. Hassur*, 225 Kan. 678, 694, 594 P.2d 650 (1979); *Sanders v. Park Towne, Ltd.*, 2 Kan. App. 2d 313, 319, 578 P.2d 1131 (1978); and *Ayers v. Christiansen*, 222 Kan. 225, 229, 564 P.2d 458 (1977).

The trial court erred in instructing the jury to consider the defendant's financial condition in awarding punitive damages absent any evidence as to that item. *Folks v. Kansas Power & Light Co.*, 243 Kan. 57, 755 P.2d 1319 (1988).

Punitive damages are not an automatic, mandatory result even when recklessness is shown, but are awarded in the discretion of the trial court. *Garcia v. Southwestern Bell Tel. Co.*, 216 Kan. 591, 533 P.2d 1242 (1975); *Nordstrom v. Miller*, 227 Kan. 59, 70, 605 P.2d 545 (1980).

The bifurcated proceeding now required does not render prior case law obsolete. The authorities cited are still useful in determining under what circumstances a jury will be permitted to consider an allowance for punitive damages and the amount to be awarded by the trial judge.

In *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 1526, 155 L. Ed. 2d 585 (2003), the Court held that a jury's punitive damage award of \$145 million for an automobile liability insurer's bad-faith failure to settle for the insured's policy limits, where the compensatory damages were \$1 million, was neither reasonable nor proportionate to the wrong committed and, therefore, violated the Due Process Clause of the Fourteenth Amendment.

Due process is not violated when a jury is allowed to consider harm to non-parties, as evidence that defendant's conduct was reprehensible, when the jury is determining whether punitive damages are appropriate. However, *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007), holds that an award of punitive damages may not include any amount to punish wrongful or unlawful conduct toward non-parties.

171.45

MORTALITY TABLE—LIFE EXPECTANCY

According to life expectancy tables, a person of plaintiff's age has a remaining life expectancy of _____ years.

This figure is to assist you in determining the probable life expectancy of plaintiff as it bears on *(his) (her)* future losses and damages. It is not conclusive proof of *(his) (her)* life expectancy, and you are not bound by it. It is only an estimate based on average experience. You may find that plaintiff probably will live a longer or shorter period than that given in these tables. This figure should be considered by you along with evidence of the health, physical condition, habits, occupation, and other circumstances bearing upon *(his) (her)* life expectancy.

Notes on Use

See Figure 1.

Credit: U.S. National Center for Health Statistics, National Vital Statistics Reports (NVSr), *Deaths: Final Data for 2017*, Vol. 68, No. 7., June 24, 2019; <http://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_07-508.pdf>.

Comment

The court may take judicial notice of mortality tables. *Knoche v. Meyer Sanitary Milk Co.*, 177 Kan. 423, 436, 280 P.2d 605 (1955); *Whetstone v. Atchison, T. & S. F. Rly. Co.*, 134 Kan. 509, 7 P.2d 501 (1932).

PIK 9.45 [PIK 4th 171.45] was cited with approval in *Hampton v. State Highway Commission*, 209 Kan. 565, 578, 498 P.2d 236 (1972).

Figure 1 Mortality Table

Table A. Expectation of life, by age, race, Hispanic origin, race for the non-Hispanic population, and sex: United States, 2017

Age (years)	All races and origins						White			Black			Hispanic ¹			Non-Hispanic white ¹			Non-Hispanic black ¹		
	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
0.....	78.6	76.1	81.1	78.8	76.4	81.2	75.3	71.9	78.5	75.3	71.9	78.5	81.8	79.1	84.3	78.5	76.1	81.0	74.9	71.5	78.1
1.....	78.1	75.6	80.5	78.2	75.8	80.6	75.1	71.8	78.2	75.1	71.8	78.2	81.2	78.5	83.7	77.9	75.5	80.3	74.7	71.4	77.9
5.....	74.1	71.7	76.6	74.2	71.8	76.7	71.2	67.9	74.3	71.2	67.9	74.3	72.3	74.6	79.8	74.0	71.6	76.4	70.8	67.5	74.0
10.....	69.2	66.7	71.6	69.3	66.9	71.7	66.3	63.0	69.4	66.3	63.0	69.4	72.3	69.6	74.8	69.0	66.6	71.4	65.9	62.5	69.0
15.....	64.2	61.8	66.7	64.3	61.9	66.7	61.4	58.1	64.4	61.4	58.1	64.4	67.4	64.7	69.8	64.0	61.7	66.4	61.0	57.6	64.1
20.....	59.4	57.0	61.8	59.5	57.1	61.8	56.6	53.4	59.5	56.6	53.4	59.5	62.5	59.9	64.9	59.2	56.9	61.5	56.2	53.0	59.2
25.....	54.7	52.4	56.9	54.7	52.5	57.0	51.9	48.9	54.7	51.9	48.9	54.7	57.7	55.2	60.1	54.5	52.2	56.7	51.6	48.5	54.4
30.....	50.0	47.8	52.1	50.0	47.9	52.2	47.4	44.5	49.9	47.4	44.5	49.9	53.0	50.5	55.2	49.8	47.7	51.9	47.0	44.1	49.6
35.....	45.3	43.2	47.3	45.4	43.4	47.4	42.8	40.0	45.2	42.8	40.0	45.2	48.2	45.8	50.3	45.2	43.2	47.2	42.5	39.7	44.9
40.....	40.7	38.7	42.6	40.8	38.8	42.7	38.3	35.7	40.6	38.3	35.7	40.6	43.5	41.2	45.5	40.6	38.6	42.5	38.0	35.3	40.3
45.....	36.1	34.2	37.9	36.2	34.3	38.0	33.8	31.3	36.0	33.8	31.3	36.0	38.8	36.6	40.7	36.0	34.2	37.8	33.6	31.0	35.8
50.....	31.6	29.8	33.4	31.7	29.9	33.4	29.5	27.1	31.6	29.5	27.1	31.6	34.2	32.1	36.0	31.6	29.8	33.3	29.3	26.9	31.4
55.....	27.4	25.6	28.9	27.4	25.7	29.0	25.5	23.2	27.4	25.5	23.2	27.4	29.8	27.7	31.4	27.3	25.6	28.8	25.2	23.0	27.2
60.....	23.3	21.7	24.7	23.3	21.8	24.7	21.7	19.6	23.4	21.7	19.6	23.4	25.5	23.6	27.0	23.2	21.7	24.6	21.5	19.4	23.3
65.....	19.4	18.0	20.6	19.4	18.1	20.6	18.2	16.4	19.7	18.2	16.4	19.7	21.4	19.7	22.7	19.3	18.0	20.5	18.1	16.2	19.5
70.....	15.7	14.5	16.7	15.6	14.5	16.6	15.0	13.4	16.1	15.0	13.4	16.1	17.5	16.0	18.6	15.6	14.5	16.6	14.9	13.3	16.0
75.....	12.3	11.3	13.0	12.2	11.2	13.0	11.9	10.7	12.8	11.9	10.7	12.8	13.8	12.6	14.7	12.2	11.2	12.9	11.9	10.6	12.7
80.....	9.2	8.4	9.8	9.1	8.3	9.7	9.2	8.2	9.8	9.2	8.2	9.8	10.5	9.4	11.1	9.1	8.3	9.7	9.2	8.1	9.8
85.....	6.6	5.9	7.0	6.5	5.9	6.9	6.9	6.1	7.3	6.9	6.1	7.3	7.6	6.7	8.0	6.5	5.9	6.9	6.9	6.1	7.3
90.....	4.5	4.1	4.8	4.5	4.0	4.7	5.1	4.5	5.2	5.3	4.6	5.5	5.3	4.6	5.5	4.5	4.0	4.7	5.0	4.5	5.2
95.....	3.1	2.8	3.2	3.0	2.7	3.2	3.7	3.3	3.7	3.6	3.2	3.7	3.6	3.2	3.7	3.0	2.7	3.2	3.6	3.3	3.7
100.....	2.2	2.0	2.2	2.1	1.9	2.2	2.7	2.5	2.7	2.6	2.2	2.6	2.6	2.2	2.6	2.1	1.9	2.2	2.7	2.5	2.7

¹Life tables by Hispanic origin are based on death rates that have been adjusted for race and ethnicity misclassification on death certificates. Updated classification ratios were applied; see Technical Notes.
SOURCE: NCHS, National Vital Statistics System, Mortality.

171.46

LOSS OF BUSINESS PROFITS

A loss of profits to a business caused by the wrongful act of another is compensable. You may award the amount of lost profits proved with reasonable certainty.

Comment

In *Vickers v. Wichita State University*, 213 Kan. 614, 620, 518 P.2d 512 (1974), the court held: “Unquestionably, a method of establishing a loss of profits with reasonable certainty is by showing a history of past profitability. Past profitability of a particular business is not, however, the only method of proving lost future profits. The evidence necessary in establishing lost future profits with reasonable certainty ‘must depend in a large measure upon the circumstances of the particular case.’” The court recognized that recovery of lost profits is not precluded merely because a business is newly-established or has not made a profit during the start-up phase of the business. “Absolute certainty in proving loss of future profits is not required. [citation omitted] What is required is that the court or jury be guided by some rational standard.” *id.*

See also *Butler v. Westgate State Bank*, 226 Kan. 581, Syl. ¶¶ 1, 2, 602 P.2d 1276 (1979); K.S.A. 84-2-708, Official Comment [“It is not necessary to a recovery of ‘profit’ to show a history of earnings especially if a new venture is involved.”]

181.01**CONCLUSION—GENERAL VERDICT**

When you retire to the jury room, you will first select one of your members to preside over your deliberations and speak for the jury in court. The presiding juror shall complete and sign the verdict form.

[Your verdict must be by ten or more jurors in this case.]

[Your verdict must be unanimous.]

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Date

District Judge

Notes on Use

K.S.A. 60-248(a) provides that a jury shall consist of twelve persons, unless the parties stipulate to any number less than twelve.

If the jury consists of twelve members, the agreement of ten jurors is sufficient to render a verdict. If the jury consists of fewer than twelve members, the verdict must be unanimous (unless the parties stipulate to a verdict by fewer than all jurors). K.S.A. 60-248(g); *Cott v. Peppermint Twist Mgt. Co.*, 253 Kan. 452, 479-480, 856 P.2d 906 (1993).

Pursuant to K.S.A. 60-248(g), the completed verdict should be read to the jury and inquiry made whether it is the jury's verdict. If a party asks that the jurors be polled individually, the clerk or judge should call each juror's name and ask him or her to answer the following question "Yes" or "No."

"Do you agree that the verdict read by the (clerk) (judge) was the verdict of the jury by agreement of at least (10) members of the jury?"

The statute does not require that any dissenting jurors be individually identified.

See PIK 4th 181.02 *et seq.* for sample verdict forms.

Comment

Oral explanation of how to mark the verdict form is not an instruction on the law of the case required to be in writing. *State v. Finney*, 141 Kan. 12, 34, 40 P.2d 411 (1935).

181.02

VERDICT FORM—GENERAL VERDICT

General Verdict on Plaintiff's Claim:

We, the jury, find for the plaintiff and assess the plaintiff's damages in the sum of \$ _____.

Presiding Juror

We, the jury, find for the defendant.

Presiding Juror

Agreement on the above verdict was by ten or more jurors.

Yes __ No __

General Verdict on Defendant's Counterclaim:

We, the jury, find for the defendant on defendant's counterclaim, and assess the defendant's damages in the amount of \$ _____.

Presiding Juror

We, the jury, find for the plaintiff on the defendant's counterclaim.

Presiding Juror

Agreement on the above verdict was by ten or more jurors.

Yes __ No __

Notes on Use

For counterclaim pleading see K.S.A. 60-207(a); 60-208(a); 60-212; and 60-213.

With slight modifications, the above general verdict forms can be used by third party pleadings. See K.S.A. 60-207(a); 60-208(a); and 60-214.

After the jury returns its verdict, K.S.A. 60-258 requires that a journal entry of judgment be filed. The jury's verdict is not an effective judgment until the journal entry is filed, and interest does not begin to run on unliquidated damages until the journal entry is filed. *McGinnes v. Wesley Medical Center*, 43 Kan. App. 2d 227, 224 P.3d 581 (2010).

181.03

CONCLUSION—SPECIAL VERDICT

When you retire to the jury room you will first select one of your members to preside over your deliberations, speak for the jury in court, and sign the verdict upon which you agree.

In this case your verdict will be returned in the form of written answers to special written questions submitted by the court. Your answers will constitute your verdict.

[Your answer to each question must be by the agreement of ten or more jurors] [Your answers to the questions must be unanimous].

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Date

District Judge

Notes on Use

See Notes on Use under PIK 4th 181.01 for a discussion of when the verdict must be unanimous.

This instruction is to be used when a special verdict or a verdict with interrogatories is submitted, as permitted by K.S.A. 60-249. A special verdict must be given in comparative fault cases (K.S.A. 60-258a), personal injury cases (K.S.A. 60-249a), wrongful death cases (K.S.A. 60-1901 *et seq.*), and any case where an award for pain and suffering is requested (K.S.A. 60-19a02 *et seq.*).

Even when special verdicts are not required by statute, the Committee recommends giving verdicts with special questions in most cases, as special questions can lay a path for jurors to follow in their deliberations. Further, giving a verdict with special questions can simplify the trial court's task of giving instructions in a complex case. This practice was approved by the Supreme Court in *Anderson v. Heartland Oil & Gas, Inc.*, 249 Kan. 458, 471-472, 819 P.2d 1192 (1991).

Comment

“The decision whether to submit a special verdict form or instruct the jury on the law and how it applies in that particular case is within the sound discretion of the trial court.” *Trendel v. Rogers*, 24 Kan. App. 2d 938, 955 P.2d 150 (1998).

The decision to submit special interrogatories or questions is discretionary with the trial court. *Anderson v. Heartland Oil & Gas, Inc.*, 249 Kan. 458, 471, 819 P.2d 1192 (1991).

A trial court's refusal to submit helpful, but not essential, questions to the jury is not grounds for reversal. *English Village Properties, Inc. v. Boettcher & Lieurance Constr. Co.*, 7 Kan. App. 2d 307, 317, 640 P.2d 1282 (1982).

Kansas follows the "Any Majority Rule" in holding that agreement by the requisite number of jurors on any questions before the jury is sufficient to constitute a verdict. The same coalition of ten need not agree on every question before the jury in order to render a valid verdict. *Hendrix v. Docusort, Inc.*, 18 Kan. App. 2d 806, 813, 860 P.2d 62 (1993).

If the requisite number of jurors agree on the finding of fault, it does not matter that they do not agree on the specific acts of negligence when two or more acts of negligence are alleged by the plaintiff and instructed upon by the court. *Cleveland v. Wong*, 237 Kan. 410, 418, 701 P.2d 1301 (1985).

A jury's findings on issues submitted by special verdicts must be certain and definite and must not be conflicting or inconsistent. *Donnini v. Ouano*, 15 Kan. App. 2d 517, 525, 810 P.2d 1163 (1991). See also *Rohr v. Henderson*, 207 Kan. 123, 130, 483 P.2d 1089 (1971).

When a jury's answers to questions on a special verdict are so patently inconsistent as not to warrant entry of judgment, a new trial should be granted. *Reed v. Chaffin*, 205 Kan. 815, 819-20, 473 P.2d 102 (1970).

Errors in the form of a verdict may be corrected pursuant to K.S.A. 60-248(g) prior to the discharge of the jury and with its consent. Amendment, correction, or reformation of a verdict are distinguished from impeachment under K.S.A. 60-441. *Traylor v. Wachter*, 3 Kan. App. 2d 536, 543, 598 P.2d 1061 (1979), *aff'd in part, rev'd in part* 227 Kan. 221, 223-224, 607 P.2d 1094 (1980).

181.04

VERDICT FORM—COMPARATIVE FAULT

We, the jury, present the following answers to the questions submitted by the court:

1. Do you find any of the parties to be at fault?

Yes ___ No ___

[Proceed to question 2 only if you answered “yes” to question 1.]

2. Considering all of the fault at one hundred percent, what percentage of the fault is attributable to each of the following (*parties*) (*persons*)?

___(0% to 100%)__%

___(0% to 100%)__%

___(0% to 100%)__%

TOTAL FAULT 100%

[Proceed to the remaining questions only if you found the fault of the party seeking damages to be less than 50% of the total fault.]

3. Without considering the percentage of fault set forth in question 2, what damages do you find were sustained by plaintiff, _____?

[Noneconomic loss to date \$___]

[Future noneconomic loss [reduced to present value] \$___]

[Medical expenses to date \$___]

[Future medical expenses [reduced to present value] \$___]

[Economic loss to date \$___]

[Future economic loss [reduced to present value] \$___]

[Loss or impairment of services as spouse \$___]

TOTAL DAMAGES \$___

Agreement on each of the above questions was by ten or more jurors?

Yes ___ No ___

Presiding Juror

Notes on Use

A special verdict form is required in comparative fault cases. No general verdict shall be returned by the jury. K.S.A. 60-258a.

All parties and any others whose causal negligence or fault must be determined under K.S.A. 60-258a must be listed in question 2.

In question 3 insert the name of the party claiming damages. If two or more parties are claiming damages duplicate question 3 for each party claiming damages.

List only those items of damages under question 3 for which evidence was introduced at trial. K.S.A. 60-249a.

K.S.A. 60-249a, 60-19a01 *et seq.*, and 60-1903 require itemization of damages in personal injury and wrongful death litigation. The language of the statutes suggests the use of “noneconomic” and “economic” phraseology in personal injury and medical malpractice verdict forms and “pecuniary” and “nonpecuniary” in wrongful death verdict forms. However, the Committee recommends the use of the terms “economic” and “noneconomic” in all three types of cases, as there appears to be no meaningful distinction between “economic” and “pecuniary.” Additionally “economic” is more readily understandable to lay jurors than “pecuniary.”

K.S.A. 60-19a02 limits the maximum allowable recovery for noneconomic loss to \$250,000 in an action for personal injuries accruing before July 1, 2014, to \$300,000 in an action accruing between July 1, 2014 and June 30, 2018, to \$325,000 in an action accruing between July 1, 2018 and June 30, 2022, and to \$350,000 in an action accruing after July 1, 2022. K.S.A. 60-1903 limits recovery in a wrongful death action also to \$250,000. Both statutes require that the jury not be instructed on the limitations.

K.S.A. 60-3407 and 60-3408 require the jury in medical malpractice cases to specify the period of time over which future economic losses will be experienced. However, in *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988), the Supreme Court held that those portions of Article 34 (Professional Liability Actions) that capped medical malpractice awards were unconstitutional. In addition the court held unconstitutional the requirement that the trial court enter judgment for the cost of an annuity contract which would pay benefits for the period of time over which future economic losses would be experienced by the plaintiff. After *Malpractice Victims* was handed down, the legislature repealed K.S.A. 60-3409 and 60-3411, which provided for the caps, and K.S.A. 60-3407 expired in accordance with its sunset provision on July 1, 1993. The legislature did not, however, repeal K.S.A. 60-3408. The Committee believes that the legislature’s failure to repeal this section was an oversight. The Committee recommends that no question be submitted regarding the duration of future economic losses, as the question is unnecessary in light of the court’s ruling striking down the annuity portions of the article.

After the jury returns its verdict, K.S.A. 60-258 requires that a journal entry of judgment be filed. The jury’s verdict is not an effective judgment until the journal entry is filed, and interest does not begin to run on unliquidated damages until the journal entry is filed. *McGinnes v. Wesley Medical Center*, 43 Kan. App. 2d 227, 224 P.3d 581 (2010).

Comment

The constitutionality of the \$250,000 cap established by K.S.A. 60-19a01 and K.S.A. 60-19a02 was upheld in *Samsel v. Wheeler Transport Services, Inc.*, 244 Kan. 726, 771 P.2d 71 (1989), and *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012). The constitutionality of the caps established by K.S.A. 60-1903 was upheld in *Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823 (1989).

It has been held error for the jury to award nothing for pain and suffering where plaintiff has incurred more than the threshold amount of medical expenses and where the uncontroverted evidence shows that plaintiff suffered more than minimal discomfort. *Miller v. Zep Mfg. Co.*, 249 Kan. 34, 47, 815 P.2d 506

(1991); *German v. Blatchford*, 246 Kan. 532, 539, 792 P.2d 1059 (1990); *Stowers v. Rimel*, 19 Kan. App. 2d 723, 727, 875 P.2d 1002 (1994).

In *Wisker v. Hart*, 244 Kan. 36, 41, 766 P.2d 168 (1988), the court cited PIK 2d 20.03 (the prior numbering of PIK 4th 181.04) with approval in holding that it is permissible to instruct the jury that it need not determine a plaintiff's damages if the plaintiff is found to be 50% or more at fault.

In *Leiker v. Gafford*, *supra*, it was held that nothing in K.S.A. 60-249a purports to restrict the categories of noneconomic damages to those listed in subsection (b)(1) of the statute. Nevertheless, the court held, "[I]n Kansas, loss of enjoyment of life is not a separate category of nonpecuniary damages in a personal injury action and ... it is error to submit a separate instruction, or provide a separate verdict form entry, on loss of enjoyment of life. However, in a proper case it is a valid subcomponent or element of pain and suffering and/or disability." 245 Kan. at 340.

In *Noon v. Smith*, 16 Kan. App. 2d 818, 820, 829 P.2d 922 (1992), the trial court's failure to instruct in accordance with PIK 2d 20.03 [PIK 4th 181.04] was held to be error.

181.05

VERDICT FORM—LOSS OF CHANCE ISSUE—SURVIVAL

We, the jury, present the following answers to the questions submitted by the court:

1. Do you find _____ was denied a substantial chance of survival due to the fault of the defendant?

Yes _____ No _____

[Proceed to question 2 and following questions only if you answered “yes” to question 1.]

2. What do you find, as a percentage of one hundred (100), were _____’s chances for survival, if *(he)* *(she)* had received proper medical care? __%

3. What do you find, as a percentage of one hundred (100), were _____’s chances for survival under the care actually given? __%

4. Without considering your answers under any of the above questions, proceed to determine the damages sustained by _____.

[Noneconomic loss to date \$_____]

[Future noneconomic loss \$_____]

[Medical expenses to date \$_____]

[Future medical expenses \$_____]

[Economic loss to date \$_____]

[Future economic loss \$_____]

TOTAL DAMAGES \$_____

Agreement on each of the above questions was by ten or more jurors?

Yes _____ No _____

Presiding Juror

Notes on Use

This verdict form should be used and appropriately modified when the action is based in part or entirely upon diminution or deprivation of chance to survive.

The trial judge should note this verdict form would need to be substantially modified if comparative fault were alternately alleged under traditional “but for” causation. Additionally, the Committee can envision circumstances when the fault of the injured party (or decedent) would have to be compared in a pure loss of chance case. Either circumstance will require creativity to fashion an appropriate verdict form. PIK 4th 181.04, Verdict Form—Comparative Fault, should be reviewed.

To calculate the damages, the Committee believes that courts should subtract the percentage of chances under the care given, as found by the jury in question three, from the percentage of chances under proper care, as found in question two, and multiply the total damages as found in question four by the remainder.

K.S.A. 60-3407 and 60-3408 require the jury in medical malpractice cases to specify the period of time over which future economic losses will be experienced. However, in *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988), the Supreme Court held that those portions of Article 34 (Professional Liability Actions) that capped medical malpractice awards were unconstitutional. In addition the court held unconstitutional the requirement that the trial court enter judgment for the cost of an annuity contract which would pay benefits for the period of time over which future economic losses would be experienced by the plaintiff. After *Malpractice Victims* was handed down, the legislature repealed K.S.A. 60-3409 and 60-3411, which provided for the caps, and K.S.A. 60-3407 expired in accordance with its sunset provision on July 1, 1993. The legislature did not, however, repeal K.S.A. 60-3408. The Committee is of the opinion that the legislature’s failure to repeal this section was an oversight. The Committee recommends that no question be submitted regarding the duration of future economic losses, as the question is unnecessary in light of the court’s ruling striking down the annuity portions of the article.

Comment

The loss of chance theory is a partial abrogation of the rule that the plaintiff must prove causation. It has been adopted as a matter of public policy to avoid “open season on critically ill or injured patients as care providers would [otherwise] be free of liability for even the grossest malpractice if the patient had only a fifty-fifty chance of surviving the disease or injury even with proper treatment.” *Roberson v. Counselman*, 235 Kan. 1006, 686 P.2d 149 (1984), *modified by Delaney v. Cade*, 255 Kan. 199, 873 P.2d 175 (1994).

Unlike comparative fault, the loss of chance theory is not an affirmative defense. It simply relieves the plaintiff of a large part of the burden of proof on causation. And, unlike comparative fault, plaintiff can recover when the health care provider’s percentage of responsibility is less than 50%. The reduction in the chance for survival or for better recovery only needs to be “substantial.” What percentage constitutes “substantial” has not yet been determined by the appellate courts.

The Supreme Court first recognized the loss of chance of survival as a valid cause of action in *Roberson v. Counselman*, *supra*. The court acknowledged that the issue related wholly to causation. 235 Kan. at 1010. The court ruled that the case should be submitted to the jury where the evidence has established that plaintiff had “an appreciable chance to survive if given proper treatment. In making the determination, the finder of fact should take into account both the patient’s chances of survival if properly treated and the extent to which the patient’s chances of survival have been reduced by the claimed negligence.” 235 Kan. at 1020.

In *Donnini v. Ouano*, 15 Kan. App. 2d 517, 810 P.2d 1163, *rev. denied* 248 Kan. 994 (1991), the Court of Appeals held that the “loss of chance” rule is an exception to the normal rule that the plaintiff must prove causation, and held that a cause of action in which the patient had a greater than 50% chance of survival does not fall under the loss of chance exception. 15 Kan. App. 2d at 521-22.

Donnini v. Ouano, supra, is also instructive as to the trial court's drafting of a verdict form that combined comparative fault and loss of chance issues.

Delaney v. Cade, 255 Kan. 199, 873 P.2d 175 (1994), is important for two reasons. First, it extends the loss of chance theory to cover loss of chance for better recovery. 255 Kan. 210-11. Second, it disapproves *Roberson's* use of the term "appreciable chance" and substitutes instead "substantial chance." The court held, "We do not adopt the any loss of a chance approach nor do we attempt to draw a bright line rule on the percentage of lost chance that would be sufficient for the case to be submitted to the jury." 255 Kan. at 215-16.

In *Dickey v. Daughety*, 21 Kan. App. 2d 655, 905 P.2d 697 (1995) *aff'd* 260 Kan. 12, 917 P.2d 889 (1996), the Court of Appeals held that the loss of chance percentage should be applied before applying the cap on nonpecuniary damages.

In *Pipe v. Hamilton*, 274 Kan. 905, Syl. ¶ 4, 56 P.3d 823 (2002), the Supreme Court reversed the trial court's decision granting summary judgment to a physician who unsuccessfully treated a patient who had only a 5% to 10% chance of survival if treated properly. The court cited with approval the definition of "substantial chance for survival/better recovery" found in PIK 3d 123.21 and 123.22 [now PIK 4th 123.21 and 123.22], and held, as a matter of law, that a 10% chance of survival is not "token or de minimis." The court ruled that the plaintiff's claim must be submitted to a jury.

181.06

**VERDICT FORM—LOSS OF CHANCE ISSUE—
BETTER RECOVERY**

We, the jury, present the following answers to the questions submitted by the court:

1. Do you find _____ was denied a substantial chance for better recovery due to the fault of the defendant?

Yes ____ No ____

[Proceed to question 2 and following questions only if you answered “yes” to question 1.]

2. What do you find, as a percentage of one hundred (100), were _____’s chances for better recovery, if (he) (she) had received proper medical care? __%

3. What do you find, as a percentage of one hundred (100), were _____’s chances for better recovery under the care actually given? __%

4. Without considering your answers under any of the above questions, proceed to determine the damages sustained by _____.

[Noneconomic loss to date \$ ____]

[Future noneconomic loss \$ ____]

[Medical expenses to date \$ ____]

[Future medical expenses \$ ____]

[Economic loss to date \$ ____]

[Future economic loss \$ ____]

TOTAL DAMAGES \$ ____

Agreement on each of the above questions was by ten or more jurors?

Yes ____ No ____

Presiding Juror

Notes on Use

This verdict form should be used and appropriately modified when the action is based in part or entirely upon diminution or deprivation of chance for better recovery.

The trial judge should note this verdict form would need to be substantially modified if comparative fault were alternately alleged under traditional “but for” causation. Additionally, the Committee can envision circumstances when the fault of the injured party (or decedent) would have to be compared in a pure loss of chance case. Either circumstance will require creativity to fashion an appropriate verdict form. PIK 4th 181.04, Verdict Form—Comparative Fault, should be reviewed.

To calculate the damages, the Committee believes that courts should subtract the percentage of chances under the care given, as found by the jury in question three, from the percentage of chances under proper care, as found in question two, and multiply the total damages as found in question four by the remainder.

K.S.A. 60-3407 and 60-3408 require the jury in medical malpractice cases to specify the period of time over which future economic losses will be experienced. However, in *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988), the Supreme Court held that those portions of Article 34 (Professional Liability Actions) that capped medical malpractice awards were unconstitutional. In addition the court held unconstitutional the requirement that the trial court enter judgment for the cost of an annuity contract which would pay benefits for the period of time over which future economic losses would be experienced by the plaintiff. After *Malpractice Victims* was handed down, the legislature repealed K.S.A. 60-3409 and 60-3411, which provided for the caps, and K.S.A. 60-3407 expired in accordance with its sunset provision on July 1, 1993. The legislature did not, however, repeal K.S.A. 60-3408. The Committee is of the opinion that the legislature’s failure to repeal this section was an oversight. The Committee recommends that no question be submitted regarding the duration of future economic losses, as the question is unnecessary in light of the court’s ruling striking down the annuity portions of the article.

Comment

See Comment to PIK 4th 181.05.

181.07

**VERDICT FORM—CARE AND TREATMENT—
ADULT WITH AN IMPAIRMENT**

We, the jury, find the proposed patient is *(a mentally ill person subject to involuntary commitment for care and treatment) (an adult with an impairment in need of a guardian or a conservator, or both).*

Presiding Juror

We, the jury, find the proposed patient is not *(a mentally ill person subject to the involuntary commitment for care and treatment) (an adult with an impairment in need of a guardian or a conservator, or both).*

Presiding Juror

181.08

VERDICT FORM—SEXUALLY VIOLENT PREDATOR

We, the jury, find the respondent is a sexually violent predator subject to involuntary commitment.

Presiding Juror

We, the jury, find the respondent is not a sexually violent predator subject to involuntary commitment.

Presiding Juror

181.20**DEADLOCKED JURY**

This is an important case. If you should fail to reach a decision, the case is left open and undecided. There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side.

Also, there is no reason to believe that the case would ever be submitted to twelve people more intelligent or more impartial or more reasonable than you. Any future jury must be selected in the same manner that you were.

These matters are mentioned now because some of them may not have been in your thoughts.

This does not mean that those favoring any particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of other jurors or because of the importance of arriving at a decision.

This does mean that you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candor. If at all possible, you should resolve any differences and come to a common conclusion so that this case may be completed.

[The giving of this instruction at this time in no way means it is more important than any other instruction. On the contrary, you should consider this instruction together with and as a part of the instructions which I previously gave you.]

You may now retire and continue your deliberations in such manner as may be determined by your good judgment as reasonable people.]

Notes on Use

In prolonged trial, the court may wish to give the substance of this instruction along with the general instructions at the close of the evidence in the case. As pointed out in the following comment, the Supreme Court has criticized the giving of coercive instructions in criminal cases after jury deliberations have begun, but suggests that the court does not risk error in giving the instruction before the jury retires. Therefore, the Committee recommends if this instruction is given, it be given with the closing instructions before the jury retires to deliberate. In that case the bracketed language should be omitted.

In *Duncan v. West Wichita Family Physicians, P.A.*, 43 Kan. App. 2d 111, 221 P.3d 630 (2010), the court found that the trial court committed error in giving the previous version of PIK 181.20, which included as its third sentence, "This, like all cases, must be decided sometime." The court strongly criticized the trial court's decision to give the instruction *after* the jury announced it was deadlocked. Though the court found it was error to give the instruction, it held that the giving of the instruction, in and of itself, would

not be grounds for reversal. However, when considered in connection with evidence of juror misconduct (*i.e.*, an advance agreement to find liability only if a low damage verdict was agreed upon), the court found reversible error.

Comment

The propriety of giving this instruction in criminal trials has been addressed on several occasions. Although few verdicts have been reversed because of giving the instruction after the jury has announced itself deadlocked, the court has been critical of the practice. In each case where the matter has been considered, the court has noted that trial courts would be well advised to submit the instruction before the jury retires to commence deliberations, not afterward. *State v. Troy*, 215 Kan. 369, 524 P.2d 1121 (1974); *State v. Boyd*, 206 Kan. 597, 481 P.2d 1015, *cert. denied* 405 U.S. 927, 92 S. Ct. 977, 30 L. Ed. 2d 800 (1972); *State v. Oswald*, 197 Kan. 251, 417 P.2d 261 (1966).

In *State v. Earsery*, 199 Kan. 208, 428 P.2d 794 (1967), oral comments accompanying this instruction were held to be coercive and prejudicial error. The giving of the instruction, coupled with the coercive oral comments, was held to be reversible error.

181.30

QUOTIENT VERDICT

The Committee recommends that no instruction on quotient verdict be given.

Comment

What constitutes quotient verdict is stated in *Blevins v. Weingart Truck & Tractor Service*, 186 Kan. 258, 263, 349 P.2d 896 (1960).

An agreement among jurors to find fault contingent upon a low damage verdict being entered was a compromise verdict that required reversal. *Duncan v. West Wichita Family Physicians, P.A.*, 43 Kan. App. 2d 111, 221 P.3d 630 (2010). The case contains a thorough discussion of compromise verdicts.

In *Williams v. Lawton*, 288 Kan. 768, 207 P.3d 1027 (2009), the Supreme Court held that an advance agreement by jurors to be bound by the quotient of all juror's individual verdicts is an impermissible quotient verdict because it subverts the deliberative process by which jurors are to arrive at their decision. Evidence of the existence of a quotient verdict is grounds for reversal.

181.40**POSTTRIAL COMMUNICATION WITH JURORS**

Ladies and gentlemen, you have completed your duties as jurors in the case and are discharged with the thanks of the Court. It is my duty to instruct you that you have an absolute right to discuss or not discuss your deliberations or verdict in this case with anyone.

Immediately after I have discharged you here today, the parties or their lawyers or other representatives of the parties may discuss the case with you, but only if you consent. Whether you discuss the case with anyone is entirely your decision. If you choose to do so, you may share as much or as little as you like about your deliberations or the facts that influenced your decision.

If the parties or their lawyers or other representatives of the parties attempt to discuss this case with you at any later time, they must first inform you of the identity of the case, their role in the case, and the subject of their requested discussion. They also must inform you of your absolute right to discuss or not discuss the case with them. If any sort of declaration has been filed with the Court regarding the jury's deliberations or verdict, the person requesting the discussion with you must offer to provide you with a copy of the declaration for your review.

You must promptly report to this Court if the parties or the lawyers or other representatives of the parties make any unreasonable contact with you, or if they attempt to discuss the case with you, without your consent. Such contact or discussion may be a violation of this Court's order.

This rule does not prevent me as the judge from discussing with you the deliberations or verdict of the jury for any lawful purpose. This rule would also not prevent a law enforcement officer from discussing with you the deliberations or verdict of the jury if the officer is investigating an allegation of criminal conduct.

Notes on Use

For authority, see K.S.A. 60-272.

Supreme Court Rule 181 governs posttrial calling of jurors and provides that jurors shall not be called for hearing on posttrial motions without an order of the court after motion and hearing held to determine whether all or any of the jurors should be called. If jurors are called, informal means other than subpoena should be utilized if possible.

191.01**AUTO ACCIDENT****Factual Summary**

Plaintiff, Benton Fender, alleges that he sustained injuries due to the fault of the defendant, Ms. Betty Bender. Mr. Fender alleges that Ms. Bender ran a red light causing her auto to collide with his. He also alleges that Ms. Bender was speeding at the time of the accident. Ms. Bender denies that she ran a red light. She alleges that Mr. Fender was speeding at the time of the collision and that he failed to keep a proper lookout for his own safety.

Mr. Fender claims permanent injuries to his back and neck, as well as past and future medical expenses, and the loss of one month's wages.

Outline of Suggested Instructions

- | | |
|------------------------|--|
| Instruction 1. | PIK 4 th 102.01, Consideration and Application of Instructions
PIK 4 th 102.03, Rulings and Actions of the Court
PIK 4 th 102.04, Statements and Arguments of Counsel |
| Instruction 2. | PIK 4 th 102.10, Meaning of Burden of Proof |
| Instruction 3. | PIK 4 th 102.20, Evaluation of Testimony |
| Instruction 4. | PIK 4 th 102.50, Expert Witness |
| Instruction 5. | PIK 4 th 106.01, Issues and Burden of Proof—Plaintiff's Claim—Defendant's Defense |
| Instruction 6. | PIK 4 th 121.01, Violation of Law Constitutes Negligence |
| Instruction 7. | PIK 4 th 121.03, Lookout |
| Instruction 8. | PIK 4 th 121.09, Traffic Control Devices |
| Instruction 9. | PIK 4 th 121.10, Traffic Control Lights—Vehicular |
| Instruction 10. | PIK 4 th 121.13, Speed Limits |
| Instruction 11. | PIK 4 th 105.01, Comparative Fault Theory and Effect |
| Instruction 12. | PIK 4 th 105.03, Comparative Fault—Explanation of Verdict |
| Instruction 13. | PIK 4 th 171.02, Types of Damages Allowed—Personal Injury |
| Instruction 14. | PIK 4 th 181.03, Conclusion—Special Verdict |
| Instruction 15. | PIK 4 th 181.04, Verdict Form—Comparative Fault |

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

Members of the Jury: It is your duty to follow these instructions. These instructions are the law in this case and they all must be considered and applied to the evidence.

During the trial I have ruled upon objections to the admission of evidence. You must not concern yourselves with the reasons for these rulings and you must consider only the evidence which is admitted. I have not intended to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

Statements and arguments of counsel are not evidence, but may help you understand the evidence and apply the law. However, you should disregard any comments of counsel that are not supported by the evidence.

Instruction No. 2.

Burden of proof means burden of persuasion.

A party that has the burden to prove a claim must persuade you that the claim is more probably true than not true. In deciding whether this burden has been met, you must consider all admitted evidence, whether presented by the plaintiff or defendant.

Instruction No. 3.

It is for you to decide whether the testimony of each witness is believable and what weight to give that testimony. In making these decisions, you have a right to use your common knowledge and experience.

Instruction No. 4.

Certain testimony has been given in this case by experts. Experts are persons who, from experience, education or training have specialized knowledge on matters not common to people in general. The law permits experts to give their opinions about such matters. The testimony of experts is to be considered like any other testimony and is to be evaluated by the same tests. You should consider it in connection with all the other facts and circumstances. You should give it the weight and credit you determine are appropriate.

Instruction No. 5.

The plaintiff, Benton Fender, claims that he sustained injuries due to the fault of the defendant, Betty Bender, in:

- 1. Failing to stop at a red light; and**
- 2. Driving her automobile faster than the posted speed limit.**

The plaintiff has the burden to prove that it is more probably true than not that he sustained injuries caused by any one or more of the claimed negligent acts or omissions of the defendant. It is not necessary that each of you agree upon a specific negligent act or omission.

The defendant denies that she was at fault, and denies that the plaintiff was injured to the extent claimed.

The defendant claims that the plaintiff was at fault in:

1. Driving his automobile faster than the posted speed limit; and
2. Failing to keep a proper lookout for his own safety.

The defendant has the burden to prove that one or more of her claims of fault on the part of the plaintiff are more probably true than not true. Agreement as to which specific negligent act or omission is not required.

The plaintiff denies that he was at fault.

Instruction No. 6.

Negligence is the lack of reasonable care. Reasonable care requires all persons who use the streets and highways to obey the rules of the road. You must decide from the evidence whether any of the following rules apply in this case and whether any rules have been violated. The violation of any of these rules is negligence.

Instruction No. 7

A driver on a public highway must keep a proper lookout for other vehicles and objects in his line of vision that may affect his use of the highway.

The driver is presumed to see those things a person would and could see while exercising reasonable care under similar circumstances.

Instruction No. 8.

A driver must obey an official traffic control device, unless otherwise directed by a traffic or police officer.

Instruction No. 9.

The driver of a vehicle approaching a steady red light must stop at a clearly marked stop line until there is a signal to proceed.

Instruction No. 10.

At the time and place and with the vehicles involved in this case, any speed in excess of 30 miles per hour was unlawful.

Instruction No. 11.

You must decide this case by comparing the fault of the parties. In doing so, you will need to know the meaning of the terms “negligence” and “fault.”

Negligence is the lack of reasonable care. It is the failure of a person to do something that a reasonable person would do, or it is doing something that a reasonable person would not do, under the same circumstances.

A party is at fault when he or she is negligent and that negligence caused or contributed to the event which brought about the claim for damages.

I am required to reduce the amount of damages you may find for any party by the percentage of fault, if any, that you find is attributable to the party.

A party will be able to recover damages only if that party’s fault is less than 50 percent of the total fault assigned. A party will not be able to recover damages, however, if that party’s fault is 50 percent or more.

Instruction No. 12.

When answering questions on the verdict form, you should keep the following things in mind:

Fault

- 1. Your first obligation is to determine if any party is at fault.**
- 2. If you decide that any person is at fault, you must then assign a percentage of fault to each party you find to be at fault.**
- 3. For a person not at fault, show 0% on the verdict form.**
- 4. If you find any person at fault, show 1% to 100% on the verdict form for that person.**
- 5. If one or more persons are assigned fault, the total of all fault must be 100%.**

Amount of Damages

- 1. You are to determine the total amount of damages of each party claiming damages.**
- 2. Your determination of damages must be made without regard to the percentage of fault you may have assigned to that party.**
- 3. The Court will make any reduction of the damages necessary for the assigned percentage of fault. You should not do so.**

You may assign fault to:

Benton Fender

Betty Bender

The parties you may find received damages are:

Benton Fender

Instruction No. 13.

When determining the amount of damages sustained by the plaintiff, you must allow the amount of money that will reasonably compensate plaintiff for his/her injuries and losses resulting from the occurrence in question. These injuries and losses may include any of the following shown by the evidence:

- 1. MEDICAL EXPENSES.** Medical expenses include the reasonable expenses of necessary medical care, hospitalization and treatment received as a result of plaintiff's injuries to date and the medical expenses plaintiff is reasonably expected to incur in the future.
- 2. ECONOMIC LOSS.** Economic loss includes loss of time or income and losses other than medical expenses incurred as a result of plaintiff's injuries to date and the economic loss plaintiff is reasonably expected to incur in the future.
- 3. NONECONOMIC LOSS.** Noneconomic loss includes pain, suffering, disabilities, disfigurement and any accompanying mental anguish suffered as a result of plaintiff's injuries to date and the noneconomic loss plaintiff is reasonably expected to suffer in the future.

When determining the amount of plaintiff's damages you must consider plaintiff's age, condition of health before and after the occurrence in question, and the nature, extent and duration of the plaintiff's injuries.

If you find plaintiff suffered an injury or injuries and more than minimal discomfort as a result of the occurrence, then you must compensate the plaintiff for plaintiff's pain and suffering. There is no unit value and no mathematical formula the court can give you for determining items such as pain, suffering, disability and mental anguish. You must establish an amount that will fairly and adequately compensate the plaintiff. This amount rests within your sound discretion.

You must itemize the amounts of damages awarded in this case on the verdict form.

Instruction No. 14.

When you retire to the jury room you will first select one of your members to preside over your deliberations, speak for the jury in court, and sign the verdict upon which you agree.

In this case your verdict will be returned in the form of written answers to special written questions submitted by the court. Your answers will constitute your verdict.

Your answer to each question must be by the agreement of ten or more jurors.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Date

District Judge

Instruction No. 15.

We, the jury, present the following answers to the questions submitted by the court:

1. Do you find any of the parties to be at fault?

Yes _____ No _____

Proceed to question 2 only if you answered “yes” to question 1.

2. Considering all of the fault at one hundred percent, what percentage of the fault is attributable to each of the following persons:

Benton Fender (0% to 100%) _____%

Betty Bender (0% to 100%) _____%

TOTAL FAULT 100%

Proceed to the remaining questions only if you found the fault of the party seeking damages to be less than 50% of the total fault.

3. Without considering the percentage of fault set forth in question 2, what damages do you find were sustained by plaintiff, Benton Fender?

Noneconomic loss to date \$ _____

Future noneconomic loss \$ _____

Medical expenses to date \$ _____

Future medical expenses \$ _____

Economic loss to date \$ _____

TOTAL DAMAGES \$ _____

Agreement on each of the above questions was by ten or more jurors.

Yes _____ No _____

Presiding Juror

191.02

AUTO ACCIDENT—TWO DRIVERS, TWO PASSENGERS**Factual Summary**

Mr. Noah Foote and his passenger, Ms. Ima Ryder, were injured when their automobile was struck in a head-on collision with an automobile driven by Mr. Bob N. Weaver. Mr. Weaver and his passenger, Ms. Bea R. Guest, were also injured.

There is evidence that Mr. Weaver's blood alcohol content was .19% at the time of the accident, and there is forensic evidence tending to establish that his vehicle crossed the center line. The Court has previously permitted an amendment of the claims against Mr. Weaver to include claims for punitive damages.

Forensic evidence also tends to establish that Mr. Foote's auto may have also crossed the center line.

Each driver has sued the other and both passengers have sued both drivers.

Mr. Foote suffered the loss of his right leg, destroying his career as a place kicker for the Chiefs. Ms. Ryder suffered several broken bones and permanent injuries to her neck and back. Mr. Weaver claims permanent injuries to his neck, and Ms. Guest was off of her job as an airline mechanic for three months due to a broken right arm.

Outline of Suggested Instructions

- | | |
|-----------------------|--|
| Instruction 1. | PIK 4 th 102.01, Consideration and Application of Instructions
PIK 4 th 102.03, Rulings and Actions of the Court
PIK 4 th 102.04, Statements and Arguments of Counsel |
| Instruction 2. | PIK 4 th 102.10, Meaning of Burden of Proof
PIK 4 th 102.11, Burden of Proof—Clear and Convincing |
| Instruction 3. | PIK 4 th 102.20, Evaluation of Testimony |
| Instruction 4. | PIK 4 th 102.50, Expert Witness |
| Instruction 5. | PIK 4 th 103.01, Negligence Defined |
| Instruction 6. | PIK 4 th 103.03, Wanton Conduct Defined |
| Instruction 7. | PIK 4 th 106.01, Issues and Burden of Proof—Plaintiff's Claim—Defendant's Defense |
| Instruction 8. | PIK 4 th 121.01, Violation of Law Constitutes Negligence |

- Instruction 9.** PIK 4th 121.21, Divided Highways
- Instruction 10.** PIK 4th 121.89, Intoxication—Under the Influence of Intoxicating Liquor or Drugs
- Instruction 11.** PIK 4th 105.01, Comparative Fault Theory and Effect
- Instruction 12.** PIK 4th 105.03, Comparative Fault—Explanation of Verdict
- Instruction 13.** PIK 4th 171.02, Types of Damages Allowed—Personal Injury
- Instruction 14.** PIK 4th 171.44, Punitive Damages
- Instruction 15.** PIK 4th 181.03, Conclusion—Special Verdict
- Instruction 16.** PIK 4th 181.04, Verdict Form—Comparative Fault

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

Members of the Jury: It is your duty to follow these instructions. These instructions are the law in this case and they all must be considered and applied to the evidence.

During the trial I have ruled upon objections to the admission of evidence. You must not concern yourselves with the reasons for these rulings and you must consider only the evidence which is admitted. I have not intended to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

Statements and arguments of counsel are not evidence, but may help you understand the evidence and apply the law. However, you should disregard any comments of counsel that are not supported by the evidence.

Instruction No. 2.

Burden of proof means burden of persuasion.

For most claims the party that has the burden to prove a claim must persuade you that the claim is more probably true than not true.

However, a party seeking punitive damages has the burden to prove his claim for punitive damages by clear and convincing evidence.

Evidence is clear and convincing if it shows that the truth of the fact asserted is highly probable.

The court will advise you which burden of proof applies to each claim.

In deciding whether this burden has been met, you must consider all admitted evidence, whether presented by the plaintiff or the defendant.

Instruction No. 3.

It is for you to decide whether the testimony of each witness is believable and what weight to give that testimony. In making these decisions, you have a right to use your common knowledge and experience.

Instruction No. 4.

Certain testimony has been given in this case by experts. Experts are persons who, from experience, education or training have specialized knowledge on matters not common to people in general. The law permits experts to give their opinions about such matters. The testimony of experts is to be considered like any other testimony and is to be evaluated by the same tests. You should consider it in connection with all the other facts and circumstances. You should give it the weight and credit you determine are appropriate.

Instruction No. 5.

Negligence is the lack of reasonable care. It is the failure of a person to do something that a reasonable person would do, or doing something that a reasonable person would not do, under the same circumstances.

Instruction No. 6.

Wanton conduct is doing something knowing that it is dangerous, and either being completely indifferent to the danger or recklessly disregarding the danger.

Instruction No. 7.

Plaintiff, Noah Foote, claims that he sustained damages due to the fault of the defendant, Bob N. Weaver, in:

- 1. Crossing the center line of the highway; and**
- 2. Driving while intoxicated.**

The plaintiff Foote has the burden to prove that it is more probably true than not true that he sustained injuries caused by one or more of the claimed negligent acts or omissions of the defendant Weaver. It is not necessary that each of you agree upon a specific negligent act or omission.

The plaintiff Foote additionally claims that the defendant Weaver acted wantonly in driving his automobile while intoxicated. Plaintiff Foote has the burden to prove this claim by clear and convincing evidence.

Defendant Weaver denies that he was at fault. He claims that plaintiff Foote was at fault in crossing the center line. Defendant Weaver has the burden to prove that his claim of fault on the part of plaintiff Foote is more probably true than not true.

Plaintiff Foote denies that he was at fault.

Plaintiff, Ima Ryder, claims that she sustained damages due to the fault of Noah Foote in crossing the center line in the automobile which he was driving. She further claims that her damages were also due to the fault of Bob N. Weaver, in:

- 1. Crossing the center line in the automobile he was driving; and**
- 2. Driving while he was intoxicated.**

Plaintiff Ryder has the burden to prove her claims of fault against Foote and Weaver are more probably true than not true. As to the defendant Weaver, it is not necessary that each of you agree upon a specific negligent act or omission.

Plaintiff Ryder also claims that defendant Weaver acted in a wanton manner in driving while intoxicated. She has the burden to prove this claim by clear and convincing evidence.

Defendant Weaver denies he was at fault and denies that plaintiff Ryder was injured to the extent claimed.

Foote also denies that he was at fault and denies that plaintiff Ryder was injured to the extent claimed.

Plaintiff, Bea R. Guest, claims that she sustained damages due to the fault of Noah Foote in crossing the center line in the automobile which he was driving. She further claims that her damages were also due to the fault of Bob N. Weaver, in:

- 1. Crossing the center line in the automobile he was driving; and**
- 2. Driving while he was intoxicated.**

Plaintiff Guest has the burden to prove her claims of fault against Foote and Weaver are more probably true than not true. As to the defendant Weaver, it is not necessary that each of you agree upon a specific negligent act or omission.

Plaintiff Guest also claims that defendant Weaver acted in a wanton manner in driving while intoxicated. She has the burden to prove this claim by clear and convincing evidence.

Defendant Weaver denies he was at fault and denies that plaintiff Guest was injured to the extent claimed.

Foote also denies that he was at fault and denies that plaintiff Guest was injured to the extent claimed.

Defendant and cross-plaintiff, Bob N. Weaver, claims that he sustained injuries due to the fault of cross-defendant, Noah Foote, in driving his automobile across the center line of the highway.

Mr. Weaver has the burden to prove that it is more probably true than not that he sustained injuries due to the claimed negligent act or omission of Mr. Foote.

Mr. Foote denies he was at fault and denies that Mr. Weaver was injured to the extent claimed.

Mr. Foote claims that if Mr. Weaver suffered any injuries, it was due to his own fault, in:

- 1. Driving his automobile across the center line of the highway; and**
- 2. Driving while intoxicated.**

Mr. Foote has the burden to prove that it is more probably true than not that Mr. Weaver's injuries were caused by one or more of his negligent acts. It is not necessary that each of you agree upon a specific negligent act or omission.

Mr. Weaver denies that his injuries were due to his own fault.

Instruction No. 8.

Negligence is the lack of reasonable care. Reasonable care requires all persons who use the streets and highways to obey the rules of the road. You must decide from the evidence whether any of the following rules apply in this case and whether any rules have been violated. The violation of any of these rules is negligence.

Instruction No. 9.

No person shall drive a vehicle over, upon or across any intervening space, physical barrier or a clearly indicated dividing section so constructed as to impede vehicular traffic between roadways on divided highways.

Instruction No. 10.

It is unlawful for any person to operate or attempt to operate any vehicle while the alcohol concentration in that person's blood or breath, at the time or within three hours after the person has operated or attempted to operate the vehicle, is .08 or more.

A driver who is voluntarily under the influence of alcohol must exercise the same degree of care under the circumstances then existing as a person who is not under the influence of alcohol.

Instruction No. 11.

You must decide this case by comparing the fault of the parties. In doing so, you will need to know the meaning of the terms "negligence" and "fault."

Negligence is the lack of reasonable care. It is the failure of a person to do something that a reasonable person would do, or it is doing something that a reasonable person would not do, under the same circumstances.

A party is at fault when he or she is negligent and that negligence caused or contributed to the event which brought about the claim for damages.

I am required to reduce the amount of damages you may find for any party by the percentage of fault, if any, that you find is attributable to the party.

A party will be able to recover damages only if that party's fault is less than 50 percent of the total fault assigned. A party will not be able to recover damages, however, if that party's fault is 50 percent or more.

Instruction No. 12.

When answering questions on the verdict form, you should keep the following things in mind:

Fault

- 1. Your first obligation is to determine if any party is at fault.**
- 2. If you decide that any person is at fault, you must then assign a percentage of fault to each party you find to be at fault.**
- 3. For a person not at fault, show 0% on the verdict form.**
- 4. If you find any person at fault, show 1% to 100% on the verdict form for that person.**
- 5. If one or more persons are assigned fault, the total of all fault must be 100%.**

Amount of Damages

- 1. You are to determine the total amount of damages of each party claiming damages.**
- 2. Your determination of damages must be made without regard to the percentage of fault you may have assigned to that party.**
- 3. The Court will make any reduction of the damages necessary for the assigned percentage of fault. You should not do so.**

You may assign fault to:

Bob N. Weaver

Noah Foote

The parties you may find received damages are:

Noah Foote

Ima Ryder

Bea R. Guest

Bob N. Weaver

Instruction No. 13.

When determining the amount of damages sustained by a party, you must allow the amount of money that will reasonably compensate the party for his/her injuries and losses resulting from the occurrence in question. These injuries and losses may include any of the following shown by the evidence:

1. **MEDICAL EXPENSES.** Medical expenses include the reasonable expenses of necessary medical care, hospitalization and treatment received as a result of a party's injuries to date and the medical expenses the party is reasonably expected to incur in the future.
2. **ECONOMIC LOSS.** Economic loss includes loss of time or income and losses other than medical expenses incurred as a result of a party's injuries to date and the economic loss the party is reasonably expected to incur in the future.
3. **NONECONOMIC LOSS.** Noneconomic loss includes pain, suffering, disabilities, disfigurement and any accompanying mental anguish suffered as a result of a party's injuries to date and the noneconomic loss the party is reasonably expected to suffer in the future.

When determining the amount of a party's damages you must consider the party's age, condition of health before and after the occurrence in question, and the nature, extent and duration of the party's injuries.

If you find a party suffered an injury or injuries and more than minimal discomfort as a result of the occurrence, then you must compensate the party for his or her pain and suffering. There is no unit value and no mathematical formula the court can give you for determining items such as pain, suffering, disability and mental anguish. You must establish an amount that will fairly and adequately compensate the party. This amount rests within your sound discretion.

You must itemize the amounts of damages awarded in this case on the verdict form.

Instruction No. 14.

In this case the plaintiffs Noah Foote, Ima Ryder, and Bea R. Guest claim the defendant Bob N. Weaver acted in a wanton manner toward them. If you find that Noah Foote, Ima Ryder, or Bea R. Guest is entitled to recover actual damages against defendant Bob N. Weaver, then you may consider whether punitive damages should be allowed. Punitive damages may be allowed in the jury's discretion to punish a defendant and to deter others from like conduct.

A plaintiff must prove by clear and convincing evidence that the defendant acted in a wanton manner toward plaintiff. Evidence is clear and convincing if it shows that the truth of the fact asserted is highly probable.

If you find defendant Bob N. Weaver did one or more of the acts claimed by plaintiffs Noah Foote, Ima Ryder, and Bea R. Guest, you should then determine whether the plaintiffs have presented clear and convincing evidence that the defendant acted in a wanton manner toward them. If you determine punitive damages should be allowed, your finding must be entered in the verdict form. After the trial, the court will conduct a separate hearing to determine the amount of punitive damages to be allowed.

Instruction No. 15.

When you retire to the jury room you will first select one of your members to preside over your deliberations, speak for the jury in court, and sign the verdict upon which you agree.

In this case your verdict will be returned in the form of written answers to special written questions submitted by the court. Your answers will constitute your verdict.

Your answer to each question must be by the agreement of ten or more jurors.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Date

District Judge

Instruction No. 16.

We, the jury, present the following answers to the questions submitted by the court:

1. Do you find any of the parties to be at fault?

Yes _____ No _____

Proceed only if you found any party to be at fault.

2. Considering all of the fault at one hundred percent, what percentage of the total fault is attributable to each of the following drivers?

Noah Foote	(0% to 100%)
Bob N. Weaver	(0% to 100%)

3. Without considering the percentage of fault you found above, what damages do you find were sustained by Noah Foote?

Noneconomic loss to date	\$ ____
Future noneconomic loss	\$ ____
Medical expenses to date	\$ ____
Future medical expenses	\$ ____
Economic loss to date	\$ ____
Future economic loss	\$ ____
TOTAL DAMAGES	\$ ____

4. Without considering the percentage of fault you found above, what damages do you find were sustained by Ima Ryder?

Noneconomic loss to date	\$ ____
Future noneconomic loss	\$ ____
Medical expenses to date	\$ ____
Future medical expenses	\$ ____
TOTAL DAMAGES	\$ ____

5. Without considering the percentage of fault you found above, what damages do you find were sustained by Bea R. Guest?

Noneconomic loss to date	\$ ____
Medical expenses to date	\$ ____
Economic loss to date	\$ ____
TOTAL DAMAGES	\$ ____

6. Without considering the percentage of fault you found above, what damages do you find were sustained by Bob N. Weaver?

Noneconomic loss to date	\$ ____
Future noneconomic loss	\$ ____
Medical expenses to date	\$ ____
Future medical expenses	\$ ____
TOTAL DAMAGES	\$ ____

7. Do you find that punitive damages should be awarded against defendant, Bob N. Weaver?

Yes ____ No ____

Agreement on each of the above questions was by ten or more jurors.

Yes ____ No ____

Presiding Juror

191.11

**MEDICAL MALPRACTICE—TWO DEFENDANTS—
LOSS OF CHANCE FOR BETTER RECOVERY—
FAILURE TO FOLLOW MEDICAL ADVICE**

Factual Summary

The plaintiff, Mr. N. Payne, sustained a severe blow to his left leg while at work on a construction job that was several miles from his home. His employer took him to the local hospital where he was seen by Dr. Rush and Dr. Bone. Dr. Rush, an emergency room physician, advised him that he had suffered a greenstick fracture of the shaft of the fibula and an oblique fracture of the tibia in his left leg. He was further advised that the bones were in perfect alignment and that treatment required the application of a leg cast and inactivity of the leg for several weeks. He was admonished that he could not walk or place weight on the leg and that he had to use crutches. He agreed to the treatment and the cast was applied by Dr. Bone, an orthopedic surgeon. He was released from the hospital with directions to report back within five days or at any time if the leg became painful.

Twenty days later plaintiff went to his family doctor with complaints of intense pain and discomfort with the leg. The leg was examined and he was advised that he had suffered oblique fractures of both fibula and tibia bones and that the bones were not in proper alignment. He was admitted to the hospital and was placed in skeletal traction. Subsequently he underwent surgery that required intramedullary pinning of both bones and extensive post-operative care and treatment.

Plaintiff filed suit against Dr. Rush and Dr. Bone for malpractice. He alleged that the doctors were negligent in the treatment of his left leg and that he had suffered pain and had incurred expenditures for hospitalization and medical treatment.

Plaintiff also claims that, had he been treated properly in the emergency room, his chances for a full recovery would have been substantially improved. He claims that he has suffered a permanent, partial disability to his left leg due to the negligence of Drs. Bone and Rush, in failing to properly diagnose the fracture to the fibula (Dr. Rush); and failing to set the bones in proper alignment, applying the cast too tightly, and releasing him from the hospital without proper medical care (Dr. Bone).

The defendants deny that they were at fault and allege that Mr. Payne was negligent in failing to follow medical directions and in walking on or applying weight to the leg.

Outline of Suggested Instructions

- Instruction 1.** PIK 4th 102.01, Consideration and Application of Instructions
PIK 4th 102.02, Evaluation of Evidence, Including Depositions
PIK 4th 102.03, Rulings and Actions of the Court
PIK 4th 102.04, Statements and Arguments of Counsel
- Instruction 2.** PIK 4th 102.10, Meaning of Burden of Proof
- Instruction 3.** PIK 4th 102.20, Evaluation of Testimony
- Instruction 4.** PIK 4th 106.01, Issues and Burden of Proof—Plaintiff’s Claim—Defendant’s Defense
- Instruction 5.** PIK 4th 123.01, Duty of Health Care Provider
- Instruction 6.** PIK 4th 123.10, Health Care Provider’s Standard of Care—Expert Testimony
- Instruction 7.** PIK 4th 123.12, Duty of Medical Specialist
- Instruction 8.** PIK 4th 123.20, Duty of Patient
- Instruction 9.** PIK 4th 171.42, Duty to Mitigate Damages
- Instruction 10.** PIK 4th 123.22, Loss of Chance—Better Recovery—Causation
- Instruction 11.** PIK 4th 105.01, Comparative Fault Theory and Effect
- Instruction 12.** PIK 4th 105.03, Comparative Fault—Explanation of Verdict
- Instruction 13.** PIK 4th 171.02, Types of Damages Allowed—Personal Injury
- Instruction 14.** PIK 4th 181.03, Conclusion—Special Verdict
- Instruction 15.** PIK 4th 181.04, Verdict Form—Comparative Fault

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

Members of the Jury: It is your duty to follow these instructions. These instructions are the law in this case and they all must be considered and applied to the evidence.

You must consider and weigh only evidence which was admitted during the trial, including exhibits, admissions, stipulations, and witness testimony either in person or by deposition.

During the trial I have ruled upon objections to the admission of evidence. You must not concern yourselves with the reasons for these rulings and you must consider only the evidence which is admitted. I have not intended to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

Statements and arguments of counsel are not evidence, but may help you understand the evidence and apply the law. However, you should disregard any comments of counsel that are not supported by the evidence.

Instruction No. 2.

Burden of proof means burden of persuasion.

A party that has the burden to prove a claim must persuade you that the claim is more probably true than not true. In deciding whether this burden has been met, you must consider all admitted evidence, whether presented by the plaintiff or defendant.

Instruction No. 3.

It is for you to decide whether the testimony of each witness is believable and what weight to give that testimony. In making these decisions, you have a right to use your common knowledge and experience.

Instruction No. 4.

The plaintiff, Mr. N. Payne, claims that he was injured due to the fault of the defendant, Dr. Rush, in failing to properly diagnose the fracture of his left fibula.

The plaintiff also claims that he was injured due to the fault of the defendant, Dr. Bone, in:

- 1. Failing to set the bones in proper alignment;**
- 2. Applying the cast too tightly; and**
- 3. Releasing him from the hospital without proper medical care.**

The plaintiff has the burden to prove that it is more probably true than not true that he sustained injuries caused by any one or more of the claimed negligent acts or omissions of the defendants. When more than one specified negligent act or omission is alleged against a defendant, agreement as to which specific act or omission is not required.

Each defendant denies that he was at fault, and denies that the plaintiff was injured to the extent claimed.

The defendants claim that plaintiff was at fault in:

- 1. Failing to follow medical instructions; and**
- 2. Walking on or applying weight to the leg.**

The defendants have the burden to prove that one or more of these claims of fault on the part of the plaintiff are more probably true than not true. When more than one specified negligent act or omission is alleged against a plaintiff, agreement as to which specific act or omission is not required.

The plaintiff denies that he was at fault.

Instruction No. 5.

A physician has a duty to use the learning and skill ordinarily used by other members of that same field of medicine in the same or similar communities and circumstances. In using this learning and skill, the physician must also use ordinary care and diligence. A violation of this duty is a form of negligence called malpractice.

Instruction No. 6.

In determining whether a physician used the learning, skill, and conduct required, you are not permitted to arbitrarily set a standard of your own or determine this question from your personal knowledge. On questions of medical or scientific nature concerning the standard of care of a physician only those qualified as experts are permitted to testify. The standard of care is established by members of the same profession in the same or similar communities under like circumstances. It follows, therefore, that the only way you may properly find that standard is through evidence presented by a physician expert witness.

Instruction No. 7.

A surgeon who holds himself out to be a specialist in a particular field of medicine must use his skill and knowledge as a specialist in a manner consistent with the special degree of skill and knowledge ordinarily possessed by other specialists in the same field of expertise at the time of the diagnosis and treatment. A violation of this duty is negligence.

Instruction No. 8.

A patient has a duty to follow reasonable directions and advice given to the patient by a health care provider.

A health care provider has the right to expect a patient to follow reasonable advice. The failure of a patient to accept reasonable treatment or follow reasonable advice does not relieve the health care provider from the results of earlier malpractice. It only absolves him from liability for any increased injury caused by the patient's failure to accept reasonable treatment and advice.

In this case you must decide whether the patient failed to accept reasonable treatment and advice. If you so find, then you must decide whether that failure

should be considered as failure to mitigate damages, or, in the alternative, as fault. If you determine conduct to be fault, it cannot also be considered as a failure to mitigate. Conversely, if you determine conduct to establish a failure to mitigate, it cannot also be considered as fault.

Instruction No. 9.

In determining the amount of damages sustained by plaintiff, you should not include any loss which plaintiff could have prevented by reasonable care and diligence exercised by plaintiff after the loss occurred.

Instruction No. 10.

The plaintiff has claimed that he was denied a substantial chance for better recovery due to the fault of the defendants. Before you can find the defendants to be at fault, you must find:

1. That plaintiff would have had a substantial chance for better recovery if the fracture had been diagnosed and treated in a timely manner and under the applicable standard of care;
2. That the defendants failed to diagnose and treat plaintiff in a timely manner and under the applicable standard of care; and
3. That the resulting injury or lessened degree of recovery suffered by plaintiff as a result of defendants' failure was substantial.

As used in this instruction, a "substantial chance for better recovery" is one which is capable of being estimated, weighed, judged, or recognized by a reasonable mind.

Instruction No. 11.

You must decide this case by comparing the fault of the parties. In doing so, you will need to know the meaning of the terms "negligence" and "fault."

Negligence is the lack of reasonable care. It is the failure of a person to do something that a reasonable person would do, or it is doing something that a reasonable person would not do, under the same circumstances.

A party is at fault when he or she is negligent and that negligence caused or contributed to the event which brought about the claim for damages.

I am required to reduce the amount of damages you may find for any party by the percentage of fault, if any, that you find is attributable to the party.

A party will be able to recover damages only if that party's fault is less than 50 percent of the total fault assigned. A party will not be able to recover damages, however, if that party's fault is 50 percent or more.

Instruction No. 12.

When answering questions on the verdict form, you should keep the following things in mind:

Fault

1. Your first obligation is to determine if any party is at fault.
2. If you decide that any person is at fault, you must then assign a percentage of fault to each party you find to be at fault.
3. For a person not at fault, show 0% on the verdict form.
4. If you find any person at fault, show 1% to 100% on the verdict form for that person.
5. If one or more persons are assigned fault, the total of all fault must be 100%.

Amount of Damages

1. You are to determine the total amount of damages of each party claiming damages.
2. Your determination of damages must be made without regard to the percentage of fault you may have assigned to that party.
3. The Court will make any reduction of the damages necessary for the assigned percentage of fault. You should not do so.

You may assign fault to:

Mr. N. Payne

Dr. Rush

Dr. Bone

The parties you may find received damages are:

Mr. N. Payne

Instruction No. 13.

When determining the amount of damages sustained by the plaintiff, you must allow the amount of money that will reasonably compensate plaintiff for his/her injuries and losses resulting from the occurrence in question. These injuries and losses may include any of the following shown by the evidence:

1. **MEDICALEXPENSES.** Medical expenses include the reasonable expenses of necessary medical care, hospitalization and treatment received as a result of plaintiff's injuries to date and the medical expenses plaintiff is reasonably expected to incur in the future.
2. **ECONOMIC LOSS.** Economic loss includes loss of time or income and losses other than medical expenses incurred as a result of plaintiff's injuries to date and the economic loss plaintiff is reasonably expected to incur in the future.

3. **NONECONOMIC LOSS.** Noneconomic loss includes pain, suffering, disabilities, disfigurement and any accompanying mental anguish suffered as a result of plaintiff's injuries to date and the noneconomic loss plaintiff is reasonably expected to suffer in the future.

When determining the amount of plaintiff's damages you must consider plaintiff's age, condition of health before and after the occurrence in question, and the nature, extent and duration of the plaintiff's injuries.

If you find plaintiff suffered an injury or injuries and more than minimal discomfort as a result of the occurrence, then you must compensate the plaintiff for plaintiff's pain and suffering. There is no unit value and no mathematical formula the court can give you for determining items such as pain, suffering, disability and mental anguish. You must establish an amount that will fairly and adequately compensate the plaintiff. This amount rests within your sound discretion.

You must itemize the amounts of damages awarded in this case on the verdict form.

Instruction No. 14.

When you retire to the jury room you will first select one of your members to preside over your deliberations, speak for the jury in court, and sign the verdict upon which you agree.

In this case your verdict will be returned in the form of written answers to special written questions submitted by the Court. Your answers will constitute your verdict.

Your answer to each question must be by the agreement of ten or more jurors.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Date

District Judge

Instruction No. 15.

We, the jury, present the following answers to the questions submitted by the Court:

1. Do you find Mr. N. Payne was denied a substantial chance for better recovery due to the fault of either defendant?

Yes _____ No _____

Proceed to question 2 and following questions only if you answered “yes” to question 1.

2. What do you find, as a percentage of one hundred (100), were Mr. N. Payne’s chances for better recovery, if he had received proper medical care? _____%

3. What do you find, as a percentage of one hundred (100), were Mr. N. Payne’s chances for better recovery under the care actually given? _____%

4. Considering all of the fault at one hundred percent (100%), what percentage of fault is attributable to each of the following parties:

Dr. Rush	(0% to 100%) _____%
Dr. Bone	(0% to 100%) _____%
Mr. N. Payne	(0% to 100%) _____%

TOTAL FAULT 100%

5. Without considering your answers under any of the above questions, proceed to determine the damages sustained by Mr. N. Payne.

Noneconomic loss to date	\$ _____
Future noneconomic loss	\$ _____
Medical expenses to date	\$ _____
Future medical expenses	\$ _____
Economic loss to date	\$ _____
Future economic loss	\$ _____

TOTAL DAMAGES \$ _____

Agreement on each of the above questions was by ten or more jurors.

Yes _____ No _____

Presiding Juror

191.21

CONTRACT, FRAUD**Factual Allegations**

Plaintiff, Claude Byers, Inc., has sued Mr. Julio Cellars for breach of contract. Byers, a wine wholesaler, alleges that Mr. Cellars breached his contract to deliver to Byers 1,500 cases of fine wines. What Mr. Cellars (whose motto is “We will sell no wine before it is paid for”) actually delivered to Byers was 1,500 cases of vinegar.

Byers also alleges that Mr. Cellars was fully aware that the wine had turned to vinegar prior to shipping it, and Byers was granted leave to amend his petition to include a claim for punitive damages based on fraud.

Mr. Cellars denies that he breached the contract and denies that he knew prior to shipping the wine that it had turned to vinegar. Further, he alleges that if, in fact, the wine had turned to vinegar, Byers failed to mitigate its damages by not wholesaling the wine vinegar to a manufacturer of salad dressings.

Outline of Suggested Instructions

- | | |
|------------------------|---|
| Instruction 1. | PIK 4 th 102.01, Consideration and Application of Instructions
PIK 4 th 102.02, Evaluation of Evidence, Including Depositions
PIK 4 th 102.03, Rulings and Actions of the Court
PIK 4 th 102.04, Statements and Arguments of Counsel
PIK 4 th 102.06, Consideration of Corporate Parties |
| Instruction 2. | PIK 4 th 102.10, Meaning of Burden of Proof
PIK 4 th 102.11, Burden of Proof—Clear and Convincing |
| Instruction 3. | PIK 4 th 102.20, Evaluation of Testimony |
| Instruction 4. | PIK 4 th 106.01, Issues and Burden of Proof—Plaintiff’s Claim—Defendant’s Defense |
| Instruction 5. | PIK 4 th 124.01, Definition of Contract |
| Instruction 6. | PIK 4 th 124.03, Formation of Contracts |
| Instruction 7. | PIK 4 th 124.16, Measure of Damages for Breach of Contract |
| Instruction 8. | PIK 4 th 127.40, Fraud—Elements |
| Instruction 9. | PIK 4 th 171.44, Punitive Damages |
| Instruction 10. | PIK 4 th 124.18, Mitigation of Loss |

Instruction 11. PIK 4th 181.03, Conclusion—Special Verdict

Instruction 12. PIK 4th 181.03-A, Verdict Form—Special Verdict

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

Members of the Jury: It is your duty to follow these instructions. These instructions are the law in this case and they all must be considered and applied to the evidence.

You must consider and weigh only evidence which was admitted during the trial, including exhibits, admissions, stipulations, and witness testimony either in person or by deposition.

During the trial I have ruled upon objections to the admission of evidence. You must not concern yourselves with the reasons for these rulings and you must consider only the evidence which is admitted. I have not intended to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

Statements and arguments of counsel are not evidence, but may help you understand the evidence and apply the law. However, you should disregard any comments of counsel that are not supported by the evidence.

Corporations are entitled to the same fair and impartial treatment as an individual.

Instruction No. 2.

Burden of proof means burden of persuasion.

For most kinds of claims, the party that has the burden to prove a claim must persuade you that the claim is more probably true than not true.

It is the law of this state that to prove fraud it is necessary for the party claiming fraud to prove it by evidence that is clear and convincing.

Evidence is clear and convincing if it shows that the truth of the fact asserted is highly probable.

In deciding whether the required burden of proof has been met, you must consider all admitted evidence, whether presented by the plaintiff or the defendant.

Instruction No. 3.

It is for you to decide whether the testimony of each witness is believable and what weight to give that testimony. In making these decisions, you have a right to use your common knowledge and experience.

Instruction No. 4.

Plaintiff, Claude Byers, Inc., claims that it sustained damages due to the breach of a contract by the defendant, Julio Cellars. Plaintiff further claims that the defendant's actions constituted fraud.

The plaintiff has the burden to prove its claim of breach of contract is more probably true than not true. The plaintiff has the burden to prove its claim of fraud by clear and convincing evidence.

The defendant denies that he breached his contract with the plaintiff, and further denies that his actions constituted fraud.

The defendant also contends that plaintiff failed to mitigate its damages. The burden is on the defendant to prove that his claim of failure to mitigate damages is more probably true than not true.

Instruction No. 5.

A contract is an agreement between two or more persons consisting of a promise that is legally enforceable.

Instruction No. 6.

A contract may be made in any manner sufficient to show agreement. It may be oral or written, or implied from the conduct of the parties.

Instruction No. 7.

If you find for Claude Byers, Inc., then you should award Claude Byers, Inc. the sum you find will fairly and justly compensate Claude Byers, Inc. for the damages you find were sustained as a direct result of the breach of contract by Julio Cellars.

In determining Claude Byers, Inc.'s damages you should consider any of the following elements of damage that you find were the result of the breach:

\$300,000.00, the purchase price of the 1,500 cases of wine.

The total amount of your verdict may not exceed the sum of \$300,000.00, the amount of Claude Byers, Inc.'s claim.

Instruction No. 8.

The essential elements required to sustain an action for fraud are:

- 1. That false or untrue representations were made as a statement of existing and material fact.**
- 2. That the representations were known to be false or untrue by the party making them, or were recklessly made without knowledge concerning them.**
- 3. That the representations were intentionally made for the purpose of inducing another party to act upon them.**
- 4. That the other party reasonably relied and acted upon the representations made.**
- 5. That the other party sustained damage by relying upon them.**

A representation is material when it relates to some matter that is so substantial as to influence the party to whom it was made.

Instruction No. 9.

The plaintiff claims the defendant acted in a fraudulent manner toward plaintiff. If you award the plaintiff actual damages then you may consider whether punitive damages should be allowed. Punitive damages may be allowed in the jury's discretion to punish a defendant and to deter others from like conduct.

The plaintiff must prove by clear and convincing evidence that the defendant acted in a fraudulent manner toward plaintiff. Evidence is clear and convincing if it shows that the truth of the fact asserted is highly probable.

If you find the defendant did one or more of the acts claimed by the plaintiff you should then determine whether the plaintiff has presented clear and convincing evidence that the defendant acted in a fraudulent manner toward plaintiff. If you determine punitive damages should be allowed, your finding must be entered in the verdict form. After the trial, the court will conduct a separate hearing to determine the amount of punitive damages to be allowed.

Instruction No. 10.

If you find that the plaintiff is entitled to recover damages for breach of the contract, then in fixing the amount of damages you should not include any loss that it could have prevented by reasonable care and diligence.

Instruction No. 11.

When you retire to the jury room, you will first select one of your members to preside over your deliberations, speak for the jury in court, and sign the verdict form upon which you agree.

Your verdict will be returned in the form of written answers to special written questions submitted by the court. Your answers will constitute your verdict.

Your answer to each question must be by ten or more jurors in this case.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Date

District Judge

Instruction No. 12.

We, the jury, present the following answers to the questions submitted by the court:

1. Do you find that the defendant breached his contract with the plaintiff?

Yes ____ No ____

2. If you answered “yes” to question 1, what amount of damages do you find was sustained by the plaintiff? \$_____

3. Do you find that punitive damages should be assessed against the defendant for fraud?

Agreement on each of the above questions was by ten or more jurors?

Yes ____ No ____

Presiding Juror

191.31

EMINENT DOMAIN**Factual Summary**

The Kansas Department of Transportation filed its petition to condemn land for purposes of construction of a new highway on September 1, 2014. Plaintiff, P. R. Ohner, owned a 40 acre parcel. A five acre strip was taken to construct the new highway. The strip taken contained approximately 1,300 feet of hedgerow which plaintiff claimed had significant value as an “historical treeline.” K.D.O.T. claimed the hedgerow had no value. The plaintiff has appealed from the appraisers’ award.

Outline of Suggested Instructions

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| Instruction 1. | PIK 4 th 102.01, Consideration and Application of Instructions
PIK 4 th 102.02, Evaluation of Evidence, Including Depositions |
| Instruction 2. | PIK 4 th 102.06, Consideration of Corporate Parties |
| Instruction 3. | PIK 4 th 102.20, Evaluation of Testimony |
| Instruction 4. | PIK 4 th 102.50, Expert Witness |
| Instruction 5. | PIK 4 th 131.01, Introductory Instruction |
| Instruction 6. | PIK 4 th 131.04, Measure of Compensation—Partial Taking |
| Instruction 7. | PIK 4 th 131.05, Fair Market Value—Definition |
| Instruction 8. | PIK 4 th 181.01, Conclusion—General Verdict |
| Instruction 9. | PIK 4 th 181.02, Verdict Form—General Verdict |

TEXT OF SUGGESTED INSTRUCTIONS**Instruction No. 1.**

Members of the Jury: It is your duty to follow these instructions. These instructions are the law in this case and they all must be considered and applied to the evidence.

You must consider and weigh only evidence which was admitted during the trial, including exhibits, admissions, stipulations, and witness testimony either in person or by deposition.

Instruction No. 2.

The Kansas Department of Transportation is entitled to the same fair and impartial treatment as an individual.

Instruction No. 3.

It is for you to decide whether the testimony of each witness is believable and what weight to give that testimony. In making these decisions, you have a right to use your common knowledge and experience.

Instruction No. 4.

Certain testimony has been given in this case by experts. Experts are persons who, from experience or training have specialized knowledge on matters not common to people in general. The law permits experts to give their opinions about such matters. The testimony of experts is to be considered like any other testimony and is to be evaluated by the same tests. You should consider it in connection with all the other facts and circumstances. You should give it the weight and credit you determine are appropriate.

Instruction No. 5.

Kansas Department of Transportation has in this proceeding through its lawful power of eminent domain taken property, as well as a temporary interest in property, for a public use. Your duty is to determine the amount of compensation that should be paid the owner for the taking.

Instruction No. 6.

Only part of the owner's property was taken in this proceeding. The property taken was 5 acres of cropland, which included trees located along 1,320 feet of a hedgerow which formed the border of the land taken. The owner is left with 35 acres. The measure of compensation you should award under these circumstances is the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining with the owner immediately after the taking. The date of taking was September 1, 2014.

To arrive at a proper award in this proceeding, your first obligation is to determine the fair market value of the entire property immediately before the taking. Your finding must fall within the range of testimony as to the fair market value immediately before the taking.

Next, determine the value of the property remaining with the owner immediately after the taking. Your finding must fall within the range of testimony as to the value immediately after the taking.

Finally, subtract your finding of the value of the property remaining immediately after the taking from your finding of the value of the entire property immediately before the taking. The difference is the amount of your award.

In determining the value of the property, you must consider all of the circumstances shown by the evidence that reasonably bear on the issue of value of the property including the following factors:

- (a) The use of the property remaining;**
- (b) The loss of trees and shrubbery;**
- (c) The loss of fences and the cost of replacing them with fences of like quality; and**
- (d) The loss or damage to growing crops.**

The above factors are not to be considered by you as separate items of damage, but are to be considered only as they affect the fair market value of the property.

Instruction No. 7.

To arrive at an award in this proceeding, you need to know the meaning of “fair market value.”

Fair market value is the amount in terms of money that a well-informed buyer is justified in paying and a well-informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion.

Fair market value shall be determined by use of (1) the comparable sales method, which values the property based upon the recent sales of comparable property; (2) the depreciated replacement cost method, which values the property based upon the reproduction cost of the property less depreciation; (3) the capitalization of income method, which values the property based upon the capitalization of net income from the property; or (4) any combination of these methods.

In determining fair market value, you should consider all of the possible uses to which the property could have been put, including the best and most advantageous use to which the property was reasonably adaptable, but your considerations must not be speculative, conjectural, or remote. The uses which may be considered must have been so reasonably probable as to have had an effect on the fair market value of the property at the time of the taking.

Instruction No. 8.

When you retire to the jury room, you will first select one of your members to preside over your deliberations and speak for the jury in court. The presiding juror shall complete and sign the verdict form.

Your verdict must be by ten or more jurors in this case.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Date

District Judge

Instruction No. 9.

We, the jury, present the following answers to the questions submitted by the court:

- I. Fair market value of the entire property immediately prior to the taking on insert date of taking:

(Range from \$ insert value to \$ insert value \$_____

- II. Value of the property remaining immediately after the taking on insert date of taking:

(Range from \$ insert value to \$ insert value \$_____

- III. Amount of total award (Subtract II from I):

(Range from \$ insert value to \$ insert value \$_____

Agreement on each of the above questions was by ten or more jurors.

Yes ____ No ____

Date

Presiding Juror

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CROSS REFERENCE TABLE

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